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VOL. V.

TRIAL

OF

AARON BURR

FOR

TREASON

PRINTED FROM THE REPORT TAKEN IN SHORT HAND

BY

DAVID ROBERTSON

COUNSELLOR AT LAW

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THE

TRIAL OF AARON BURR.

AFTER *Mr. Wickham* closed his argument, on Friday the 21st day of August, 1807, *Mr. Hay* stated, that he wished to examine the other witnesses, by whom he expected to prove an overt act.

ISRAEL MILLER was then sworn.

Mr. Hay. — Were you on the island, Mr. Miller, with Blannerhassett and his party at the time charged in the indictment, the 10th of December last?

I arrived on the island between the 7th and 10th of December last, in company with Colonel Tyler, who had four boats.

How many men had he with him?

About thirty-two men.

What proportion of arms had they?

Five rifles and about three or four pairs of pistols are all that I know of. I joined them at Beaver, and went down with them to Blannerhassett's Island, and there I saw one blunderbuss, two pairs of pistols, and one fusee. I do not know that there were any more.

Mr. Burr. — How many bullets did you see run?

I only saw one man run bullets.

PURLEY HOWE was then sworn.

Mr. Hay. — Will you be pleased to say what you know of the party on the island, their arms and conduct?

I was not on the island during their stay on it. I was applied to by Mr. Blannerhassett to make about forty boat-poles. On the evening of the 10th day of Decem-

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ber. I went to the landing (on the Ohio side) to deliver them, being called upon to do so, and Blannerhassett sent his flat to receive them. In this flat were two sentinels, being two young men, each of them armed with a rifle.

State what you know of their arms on the island.

I flung the poles down the bank and offered them assistance, but they said they had men enough. One of my neighbors, Mr. Allan Wood, wished to go over in the flat; but they refused to take him, saying, they had orders not to let any person go with them from the Ohio side.

Did you see any arms but the two rifles?

None but those in the hands of these two young men. One of them laid down his rifle in the bow of the flat, and stowed away the poles as they were handed in; while the other sat on the bow and held his rifle across his thighs. I saw men on the island for three or four days, who were said to be Tyler's or Blannerhassett's men.

Mr. Mac Rae. — Did you see those two men who were guards leave the boats?

I did not: they staid there constantly.

Did you know these men? Were they not all strangers to you except Peter Taylor?

They were.

Mr. Burr to Mr. Miller. — Did you see General Tupper there?

I did not see him, but I understood that he was there.

Did you see any disturbance there?

No.

Were you with the boats all the time?

I was.

Mr. Wirt. — Did you join this party there or come with them?

I came from Beaver with them.

Mr. Edmund Randolph then addressed the court.

May it please your Honor,

I might be satisfied with what has been said by Mr. Wickham yesterday and to-day, as sufficient to open and fully explain the grounds of our application to the court; but on this occasion, my duty as counsel is fortified by my duty as a citizen, to combat and, if possible, refute the pernicious doctrines of constructive treason, which

are attempted to be supported by the gentlemen on the other side.

The evidence brings us fairly to four points, which I shall submit, in the form of questions, to the consideration of the court.

1. Whether there can be treason in levying war without the employment of force.

2. Whether, under the constitution of the United States, a person, who it is admitted would be an accessory in felony, can be considered as a principal in treason in levying war.

3. Whether, under the form of this indictment, charging Colonel Burr with having done the act personally, any evidence of a derivative or accessorial agency can be admitted.

4. And if such evidence of a derivative or accessorial treason were to be admitted, under this indictment, whether the real principal ought to be first convicted.

First, I contend, that there can be no treason without the exercise of actual force.

We make no dereliction of the plea of innocence, which the law presumes as a safeguard to life. The counsel would fail in their duty to their country, as good citizens, if they were to waive this defence, which is so strongly connected with the public safety. This high ground of presumptive innocence, which the law has granted to us, should be defended for the public safety, and for the purpose of fixing and preserving those great principles, without which it cannot exist.

The law of treason should be clearly understood, and the regulations and rules concerning it well ascertained; for, as Montesquieu has justly observed, if the doctrine of treason be indeterminate in any country, however free its form of government, it is sufficient to make it degenerate into tyranny. There is no reason to believe that it would be otherwise in our country, as Mr. Hay would persuade us (though I believe its government the best on earth), for I am told by the framers of the constitution, that they have prevented that very evil from happening by fixing precise terms in that instrument; that they have bound down the legislature by special words descriptive of treason, and erected a barrier beyond which they can-

not depart by any construction, and thus prescribed limits, from their jealousy of man even clothed with legislative honors. Every man takes a personal interest in the affairs of his country, and is alarmed at the name of treason. Of this we find a confirmation in the declaration of Mr. Jefferson, that Colonel Burr was guilty. That declaration excited the utmost alarm throughout the country. This appears still more fully confirmed by the examination of the persons summoned as grand and petit jurors. From the examination of those who are to sit on this occasion, and those who were selected for that purpose, but excluded, it is manifest that the prejudices excited by this alarm have almost overwhelmed the whole country. If it were necessary to go into a full examination of this subject, it would appear from a general scope of the history of the world, that if the doctrine of treason be not kept within precise limits, but be left vague and undefined, it gives the triumphant party the means of subjecting and destroying the other; means which may be too readily and eagerly employed.

If the law of treason ought not to be left unfixed or uncertain, there ought to be no treason in levying war without the employment of force; for if force be dispensed with, it will be extremely uncertain and dependent on the will of the government. It was intimated the other day by the gentlemen on the other side, that we had a definition of treason in levying war given by the Supreme Court, in the case of Bollman and Swartwout; and that it consisted in enlisting and assembling men without the exertion of any force.

I should yield to the decided and still acknowledged good sense of the judiciary; because that corps is, in my estimation, the *palladium* of individual safety. I should do so with the greater cheerfulness because those who compose it are individuals who are studious to avoid, averse to repeat, and never unwilling to recant error.

Sir, may I be indulged with one remark, which may perhaps seem too strong: I should be deceived for more than twenty years with respect to him who delivered that opinion, if he would hazard a stain on the sword of justice by such a construction of the law of treason as has been given by the gentleman on the other side. Yes, sir, I do

say, that this cannot be the language and sentiment of the Supreme Court. For, first, the point was not discussed, nor necessary to be discussed ; and what was said concerning it was therefore extrajudicial. What were Bollman and Swartwout charged with ? They were charged with treason generally ; but it was well ascertained, that there was no evidence of actual force in levying war, and therefore it was unnecessary to pay any attention to that subject. The decision on this point, if there were any such, was extrajudicial ; for whatever it determined, on everything not submitted to its decision, was so *pro hac vice*. But what if it had been so decided ? Would it be contended that we must adhere to it ? Uniformity of rules is sometimes attempted to be preserved in civil matters ; and experience has proved that, provided the law be established in matters of property, it is immaterial what it is, as rules of property are mostly mere creatures of society ; but when we come to speak of human rights, of questions affecting the principles of civil liberty, no judge will be opposed to reconsider the subject merely because he has once given an opinion on it. A precedent hastily adopted may produce the most destructive consequences. A just theory ought to be sought in order to make government a protector, not a Moloch. The manes and family of one unrighteously condemned ought not to be appeased by the sacrifice of another. Even in regard to civil matters, in mere questions of property, our Court of Appeals does not only not bind itself by one decision, but even permits its subordinate tribunals to re-examine points in which there has been but a single decision. If it were otherwise, especially in criminal cases, error would beget error, and one wave of injustice would succeed another, till our land should be overwhelmed and unfit for the habitation of human liberty. But if the language of the Supreme Court were ever so explicit and imperious, but now found to be incorrect, as applied to this case, how are you to proceed ? Aware that you are a subordinate tribunal, and that there exists that relation between you and the Supreme Court which public utility requires, you would wish to conform to the principles of its decisions : but what species of subordination is required ? Surely not a sanguinary one. I

do not believe that there is a subordinate court in the United States, that, if once impressed that a wrong sentence was given against the accused, would not see in a moment that in conforming to it, it would be made an instrument of injustice against its own conscience. What are you to do? I know not. I do not, I dare not ask you to rebel, nor prescribe what you should do; but let us pray Heaven to stay the arm of the destroying angel. Sir, I contend that with regard to that decision, it ought not to affect the question now before the court; for elementary principles drawn from one case, so as to influence another, depend upon similitude of facts; and if drawn from one case, the most perfect similitude ought to be shown. Will gentlemen examine the case of Bollman and Swartwout, and compare it with the case of Colonel Burr? Is there any resemblance between them? It is indispensable that general expressions in that or any other opinion be taken with reference to the particular facts and questions then under consideration. What precedent is ever drawn from a dissimilar case? It was contended in Bollman and Swartwout, that there was no military force, or military assemblage, and therefore it was unnecessary to inquire whether force were indispensable to the consummation of treason. The court finding no probable cause of fact, without mischief to Bollman and Swartwout, extended its positions beyond the degree commensurate with the case; but I deny that it extended them as far as the counsel for the prosecution insist. It did not intend to write a treatise on the subject. It had no assistance from the bar. The principle now under consideration was not discussed. No authorities were adduced from other cases, to lead the decision of that case: and what difference is there between the Supreme Court and inferior courts, but this, that in the more elevated parts of the atmosphere, the rays which proceed from the sun of justice should come to us with less refraction?

Secondly. The opinion of the Supreme Court, as it is understood by the gentlemen on the other side, is inconsistent with itself; because it refers for support to the opinions of Judges Patterson, Iredell, and Chase, and the latter's more particularly. This opinion of the Supreme Court declares that "in conformity to the principles now

laid down, have been the decisions heretofore made by the judges of the United States. The opinions given by Judges Patterson and Iredell, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied, than on the nature of the force itself. *Their opinions*, however, *contemplate the actual employment of force.*" How can the opinions of Judges Iredell and Patterson support the declaration, that a mere assemblage of men, without actual force, shall constitute treason, when they "contemplate the actual employment of force"?

But the opinion of the Supreme Court refers more particularly to that of Judge Chase. "Judge Chase, in the trial of Fries, was more explicit. He stated the opinion of the court to be, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution *by force*, they are guilty of the treason of levying war; and the *quantum* of the *force employed* neither lessens nor increases the crime; whether by one hundred or one thousand persons, is wholly immaterial. The court are of opinion," continued Judge Chase, on that occasion, "that a combination or conspiracy to levy war against the United States, is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some *actual force or violence must be used in pursuance of such design to levy war*, but it is altogether immaterial whether the *force used* is sufficient to effectuate the object; *any force, connected with the intention*, will constitute the crime of levying war." Judge Chase is explicitly of opinion, then, *that some actual force or violence must be used.* How can this be reconciled with their construction, that a bare "assemblage of men, met for a treasonable purpose, is sufficient to constitute the crime of levying war"? This comparison is in plain language, and cannot be misunderstood. It proves most clearly the fallacy of the doctrine for which gentlemen contend. But I may be told, that Judge Chase was present on the bench when the Supreme Court decided, that "the fact of levying war may be committed by an assemblage of men, for a purpose treason-

able in itself," and that "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors," and from whence it may be contended, that he assented to these short sentences. Sir, I derive a contrary argument from it. Unless he had retained his former opinion, unless he had believed that the whole tenor of the opinion of the Supreme Court was consistent with that former opinion, he would have dissented from it, and avowed his disapprobation of a decision not recognizing the rectitude of that former opinion. He could not mistake his *own* former opinion; and his concurrence in the sentence of the Supreme Court, approving it, clearly evinces, that he still entertained the same sentiments. This is, therefore, an argument in our favor, that all the judges would have given a contradiction to opinions already given in such explicit terms, if they had disapproved of them. If Judge Chase had not adhered to his opinion, he certainly would have said so, and not have sanctioned a decision which would not have taken place without his concurrence.

According to the opinions of those three judges, an assemblage without force could not be guilty of the crime of treason in levying war. Suppose, then, that the judges had used all those expressions in the sense on which the counsel for the United States so earnestly rely, and had changed and disavowed expressly those former opinions, and had given up the point, that treason could not be committed without actual force, would you punish the accused for acting conformably to those former opinions? Can there be a more rank oppression than to punish a man for doing what he might fairly believe to be lawful, according to the opinion of the judges? Would you pronounce sentence one way, while the context of the law was the other? You will save him from such an oppressive construction as would involve him in a crime which he never had thought of. There is too much horror in such a construction to believe that you would for a moment support it.

Judge Patterson, in the cases of Vigol and Mitchell,

reported in 2 *Dallas's Rep.*, page 346, uses very extensive reasoning indeed, which would have been entirely superfluous, if mere intent and an assemblage were sufficient to constitute treason in levying war. It was unnecessary there, because actual violence and the actual employment of force were proved to have taken place in Vigol and Mitchell. Even when Mr. Patterson cites *Foster*, page 213, to show that even the march from Crouch's fort towards Neville's might be considered as actual employment of force, he does not rely on it, but he connects with it the attack on Neville's house with intent to resist the execution of the laws, constituting together the actual employment of force. I believe, therefore, from what forms the basis of this opinion of the Supreme Court, that it cannot be on this point authoritative to the extent of the literal meaning, and that it would be inconsistent with itself if the doctrine now contended for were the true one.

Thirdly. It is repugnant to every case decided in the United States, that has come within my knowledge; for in all of them this actual force has been employed.

In Vigol's case, 2 *Dallas's Rep.*, page 346, violence was committed at Reigan's and Wells's houses, and in Mitchell's case, 2 *Dallas's Rep., page* 355, violence was committed at Neville's house. In both these cases, Patterson laid particular stress on these acts of violence as essential to the crime. Although Patterson quotes *Foster*, page 213, there is enough in his general reasoning to show, that he does not rely on it as direct authority, but shows that Mitchell was sufficiently connected, by evidence, with acts of violence at Neville's house. It is even questionable, whether Patterson's reference to *Foster*, page 218, to show that enlisting and marching are sufficient overt acts of treason, without coming to a battle, be supported by the authorities referred to. Vaughan's case, in 2 *Salk.* and 5 *State Trials*, is relied on to support it. The indictment in that case contained two counts, one for adhering to the king's enemies, and the other for levying war. If this case do not, no other case can be found in support of such doctrine. It was for adhering to the king's enemies without the kingdom, and levying war by attempting to cruise on the subjects of Great Britain; his

cruising in a vessel with a commission to act against those subjects was certainly adhering to the king's enemies under that count, but would not support the count for levying war.

Patterson indeed says, that the attendance at Braddock's Field would be sufficient, if the designs were treasonable. This had been but faintly urged as a distinct act of treason, because the attacks on these two houses were a sufficient ground of accusation, and the discussion of the effect of an assemblage, without actual violence, was unnecessary. But there may have been hostility at Braddock's Field. I do not recollect the history of the transactions at Braddock's Field; but from their conduct to the commissioners who were sent to them, to accept of their submission to the laws, there must have been acts of violence committed there. I may add to all these considerations the repugnance of this doctrine to the objects of the constitution of the United States in defining treason. Though part of the words of the English statute is used in the constitution, yet all the constructions of that statute, in England, are not to be adopted here, because there are many *dicta*, and most of them arising out of, and confounded with, the doctrine of compassing the king's death; and which doctrine would never have been adopted but for the attainment of the great object, a safeguard for the life of the king.

I will not enter into verbal criticisms, though they operate in our favor; but will merely observe, that to *levy war* is to *make war*, to *wage war*. It is admitted, 1st, that a conspiracy to levy war is not treason; 2dly, that actual enlistment of men is not treason (though both are preparations of war); and 3dly, that individuals marching to a place of partial rendezvous is not treason. These are points established in the opinion of the Supreme Court, on which gentlemen rely. Here we have everything but an assemblage. What is an assemblage but a further step? How shall we distinguish between where enlistment ends and assemblage begins? Will two make an assemblage? One will not. What is the criterion of an assemblage? Where is certainty to be expected? What rule is there for discriminating these nice shades of distinction? There can be none but the actual employment of

force. Constructive treason, we all say, ought to be reprobated, and yet here is an opening made for it. But Mr. Hay says, that it is not constructive treason; that to obtain the opinion of the court what treason is, is necessary. Construction may be necessary, by introducing new persons by analogy; but this is worse than constructive treason; it is fiction; it is legislation. The gentleman has excluded actual force altogether from his definition of treason. But Mr. Hay put one question which deserves considerable attention. He supposed an assemblage met to subvert the government; that they march and are ready to strike a blow, but are by some means or other counteracted and dispersed before they strike. Would not these men, he asks, be traitors? That gentleman seems to consider the sovereign, with respect to the citizens, as the sovereign would regard a foreign power, and that your government would treat your citizens as one sovereign power would treat another. If a foreign power manifest an intention to commit the slightest hostility, it may be considered as hostile and anticipated. This doctrine as applied to individuals is unjust; it makes no distinction between incipient and consummate crimes. You admit that a conspiracy is no treason; that enlistment is no treason. Will you punish as perfect what is but inchoate? Will you transplant to your citizens that which belongs to nation and nation? The rule of law attaches particular punishments to particular criminal acts, according to their different grades, from the highest to the lowest; but never inflicts the same punishment on the lesser crime which it inflicts on the greater. We have seen how this doctrine might have operated. I have marked the progress of the sedition law from beginning to end. Sedition and libels are both terms of reference: they refer to the government. The dangerous consequences of this law alarmed the people. The facility with which, perhaps, even innocent acts might be construed into libels, excited general apprehension and alarm. *Words* only *expressed* or written were the objects which that law punished; and might be made the foundation of the most oppressive abuses by an unjust government. The most formidable conspiracies might be feigned, and loose declarations tortured into proofs of

their existence. I wonder, when the reprobation which attended that act is so well known, that a doctrine so much more dangerous to the liberty of the citizen should be advocated.

This doctrine therefore is contrary to all the decisions of every court in the United States.

Thirdly. It is also repugnant to the English doctrine. Even in England we do not find a principle like this. There is no case to be found in the English books of a decision of treason in levying war, where actual force has not been employed.

In Benstead's case, reported in *Foster*, page 211, 212, there was force; the house of the archbishop was attacked.

In Damaree's and Purchase's cases, page 214, 215, the mob, of which they were a part, demolished meeting-houses and attacked the guards who were ordered to disperse them. With regard to the case of Purchase, there were some doubt and diversity of opinion among the judges present at his trial. Why was this doubt? Because it did not appear upon the evidence that he had any concern in the original rising, or was present at the pulling down any of the houses, or any way active in the outrages of that night.

In Oldcastle's case, 1 *Hale*, page 141, the indictment was principally founded on compassing the king's death, and yet the overt act laid is assembling to levy and actually levying war; page 144, there was actual marching in a warlike manner. All the authorities concur, Foster, Hale, Hawkins, Kelynge, and even the inexorable Coke, who, while attorney general, had no bowels, confirm all I have said.

In 4 *Blackstone's Commentaries*, page 146, a riot is described to be an unlawful act of violence, and cannot be without force; it is described by the same words, in substance, as "levying war," by rising or insurrection, or with force and violence. Without insurrection or rising, or, what is the same thing, without force and violence, there can be no riot. A riot implies force; it is the same as actual force; and if there cannot be so much as a riot without actual force, surely there can be no levying of war without such force. But see in full strength the case

of Green and Bedel, in *Kelynge*, page 72–79. There were four indictments against several different persons for treason, in levying war against the king. The first indictment was against Peter Messenger and William Green and others ; and the third against Edward Bedel and R. Lattimer. There were special verdicts found in each case, and different judgments rendered thereon, against the different parties except Green and Bedel. "But as to Green, in the first special verdict, and Bedel in the third, all the judges agreed that the verdict was not full enough to make it treason as to them ; because the verdict only found, that they were present, *but found no particular act of force committed by them*, or that they were aiding and assisting to the rest, which was a matter of fact, which ought to be expressly found by the jury, and not to be left to the court upon any colorable application." This is the only solemn opinion on this point, but it is decisive to show, that without force there can be no treason in levying war.

This is confirmed by 1 *Hale*, page 146, who says, that king's castles may be detained, and if not with force, without treason.

Chief Justice. — Is not that denied to be law ?

Mr. Randolph. — Not that I know. Indeed I understand it to be confirmed by *Foster*, page 219, that to detain a castle without force is not treason. He says, that "holding a castle or fort against the king or his forces, *if actual force be used*, in order to keep possession, is levying war ; but a bare detainer as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason." Foster, Hale, Hawkins, Coke, Kelynge, Reeves, and all other writers, you will find, concur in proving, that not a single indictment for treason in levying war has ever been carried into complete effect in England without actual force.

This treason is divisible into three distinct ideas. First. The intention. Second. An assemblage. Third. The use of force. If the first and second only happen, what harm can result which will not be punished in a lesser way ? If the third shall not be necessary, where is the *locus pœnitentiæ ?* Shall all be punished with death ? Will any

assemblage of men, without the use of the least violence or force, be said to constitute treason, when they are perfectly peaceable, and not even so much as a riot committed? Between such an assemblage and the commission of treason, there is a great and natural space. Shall it be said, that because two out of the three component parts have occurred, the offence is consummated without the third? You see that I am not speaking now with reference to Colonel Burr, because the crime imputed to him is accessorial; but I am speaking of the principal, as Blannerhassett, Tyler, or Smith; that actual force must be proved to have been employed by them, or some of them, or that there was no war levied; but this branch of the subject will be more fully explained hereafter.

The maxim, "*Furor arma ministrat*," does not apply to this case. Where a great number meet, with a design to commit universal mischief, and begin it, there their number and fury supply their want of arms; and they are guilty of treason as soon as they proceed to the execution of this universal devastation, though they are not armed with military weapons. But here there is no proof of such a design. The assemblage must be armed in military array; there must be a military appearance, a military exhibition, to make it treason, and to connect Blannerhassett with Colonel Burr.

Amidst all the difficulties of this trial, I congratulate your Honor on having an opportunity of fixing the law, relative to this peculiar crime, on grounds which will not deceive, and with such regard to human rights, that we shall bless the day on which the sentence was given, to prevent the fate of Strafford. — 6 *Hume*, page 340.

The second point, which I propose to establish, is, that Mr. Burr cannot become a principal, even if he were an accessory. Does the constitution admit that accessories are principals? or that there is no essential difference between them? There is not a syllable in it to this effect. It says that treason shall "consist in levying war;" that is, that any person levying war shall be guilty of treason. The language is very short and plain: "*It shall consist in levying war.*" In common parlance, if the mere writing of a letter were adverted to, and it were asked, "*Who wrote that letter?*" would not the answer be, The real

penman or *amanuensis?* So in this case, he who levied war must mean the person who actually did levy it, in person. To introduce another person than the real actor must depend, —

1. Upon fiction of law, or,

2. Upon common law; for the constitution is silent, and there is no statute upon the subject.

1. As to fiction of law, the constitution does not recognize it. Fiction of law never prevails in criminal cases. It is never tolerated in them. Various rules are laid down, and great nicety required, with respect to criminal cases and proceedings, which do not extend to civil cases. Yet all these niceties are in favor of the accused, against whom no fiction of law is allowed, or even a conjecture indulged, on a prosecution for any offence whatsoever. How can fiction of law prevail here, when the constitution says, that treason shall consist in levying war? Is it not the same thing as if it had said, that no person shall be convicted of treason unless he actually levy war himself against the United States? Let this principle of fiction be once admitted, and I defy even your courts to determine to what extent it may go. It may lead to the extinction of every principle of freedom. If we exclude this principle of imagination and fiction, we protect the liberties of our country; for it is no other than the cause of liberty, which cannot be separated in this instance from that of the accused. I insist, therefore, that no fiction of law authorizes the introduction of any other person than the *real actor*, so as to be guilty of treason in levying war.

2. I contend, that no other person than the actual perpetrator can be introduced, upon the common law. I will here read the able opinion of Judge Chase on this subject, which I believe is not controverted to be law. It is reported in 2 *Dallas's Rep.* in the case of the United States against Warrall, in the Circuit Court of Pennsylvania, on an indictment for attempting to bribe Tench Coxe, the commissioner of the revenue. After a verdict of "guilty," Dallas moved in arrest of judgment. Judge Chase asked Mr. Rawle, the attorney for the United States, whether he meant to support this indictment solely at common law. Mr. Rawle answered in the affirmative. The judge

stopped Mr. Levy, who was about to reply, in support of the motion in arrest of judgment, and delivered an opinion to the following effect:—

"This is an indictment for an offence highly injurious to morals, and deserving the severest punishment; but, as it is an indictment at common law, I dismiss, at once, everything that has been said about the constitution and laws of the United States."

The judge then stated that the constitution is the source of all the jurisdiction of the national government, of which the departments never can assume any power not expressly granted by that instrument. He then proceeds: "Besides the particular cases, which the eighth section of the first article designates, there is a power granted to Congress to create, define, and punish, crimes and offences, whenever they shall deem it necessary and proper by law to do so, for effectuating the objects of the government; and although bribery is not among the crimes and offences specifically mentioned, it is certainly included in this general provision. The question, however, does not arise about the power, but about the exercise of the power: Whether the courts of the United States can punish a man for any act before it is declared by a law of the United States to be criminal? Now, it appears, to my mind, to be as essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence upon conviction.

"It is attempted, however, to supply the silence of the constitution and statutes of the Union by resorting to the common law for a definition and punishment of the offence which has been committed. *But, in my opinion, the United States, as a federal government, have no common law; and consequently no indictment can be maintained in their courts for offences merely at the common law.* If, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace *when*, or *how*, the system was adopted or introduced." After explaining how the different colonies or states had adopted different parts of the common law, as they found them to

be applicable to their condition and promotive of their conveniences, so that some states rejected what others adopted; that the common law of one state is not the common law of another, but that the common law of England is the common law of each state, so far as each state has adopted it; and that it resulted from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they be instituted in a federal or state court; the judge further proceeded. "But the question recurs, *when* and *how* have the courts of the United States acquired a common law jurisdiction in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents. Now, the United States did not bring it with them from *England;* the constitution does not create it; and no act of Congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in *England;* or modified, as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

Here *Mr. Hay* interrupted *Mr. Randolph*, and observed that it was unnecessary to labor that point; that unquestionably the United States, as a federal or general government, had no common law; though under the state law, connected with the judicial act, it might be considered as existing to a limited extent.

Mr. Randolph. There is no common law in the United States which will support an indictment in any of the courts of the United States. The whole cannot be supported, but it seems that a part can be supported. Treason cannot be supported, but one half of it, it seems, can. What species of logic is this, to be adopted in a criminal case? You cannot maintain an indictment at common law, but you can introduce, by reference to the common law, a new person not mentioned by the constitution as liable to be involved in the guilt of treason! Though the constitution limits the guilt to him who levies the war in person, yet by the collateral operation of this common law, it is extended by relation to an accessorial agent. But their refuge from this argument is, that we

all said that common law and common sense are the same; and that according to common sense this point was to be construed and decided. Is it according to common sense that they should introduce a new personage not mentioned in the constitution? Do not the rules of common sense vary according to circumstances? Does common sense justify the subjection of the people of the United States to the evils of constructive treason?

Here *Mr. Hay* explained, that he only meant to say, that the provisions of the constitution ought to be construed according to the principles of common sense.

Mr. Randolph. I will examine the idea of Mr. Hay as he has explained it. He applies common sense to the constitution, and introduces by construction a principle not known to it. Common sense, it seems, creates an accessory, and introduces him as a principal, contrary to the constitution. Common sense does not say, like the constitution, that treason consists in levying war, but brings in a new person to participate in the guilt and punishment of treason. This common sense extends, instead of restraining, the rigor of capital punishments. This common sense is oppression and tyranny. I pray Heaven to save us from the deductions of such common sense as this. Our client complains with great justice of the general and violent prejudices which have been artfully and sedulously excited against him. We see, however, that by availing ourselves of the advantages which the law of the land secures to persons accused, twelve impartial men may be got to decide on the charges against him. If the just doctrines of the law be for him, let him prevail, and not condemn him without a fair examination of his defence, because he is accused and persecuted.

But it was said by the gentleman, that this construction ought to be adopted on principles of national policy. Who ever heard before of national policy in a criminal case? Who ever heard of state policy, wielded as a weapon in aid of the law, in the prosecution of an unfortunate prisoner? Common sense is vague enough, but national policy is infinitely worse. There need be no code of laws, no rules of right: you may burn all your books and abandon humanity and common sense: for

constitution and laws, and restraints and checks, will be unavailing, and this favored country will be ruined, if a doctrine like this be tolerated.

But we are exultingly asked, "Is an accessory to escape altogether?" I will not undertake to say what is to become of him, whether he may not be indictable *as an accessory* in due time; or whether it be a "*casus omissus.*" But I contend that the act of an accessory is not treason. Whether the law punish it or not, is immaterial; it is not treason. The constitution itself appears to me to contain plain and explicit language, to mark out the lines within which the legislature may shape its deliberations, and to have fixed the limits, beyond which the legislature must not go. This constitution is not subject to variation: not a tittle can be added to it: it prescribes the definition of treason: the law of Congress only adds particulars; but no law of Congress can change the definition of treason. The people, in establishing this palladium of their liberties, would not confide this power to their legislative agents. I dread every attempt to innovate on this subject. Guard therefore this constitution from violation. There are, it is true, opinions of some judges, that in treason all are to be considered as principals. What are we to say to these doctrines found in the books? Are we to receive them without examination or reserve? Are we to consider them, however unjust or inconvenient, as ingrafted into our constitution? Are we to bow down to them, as to the image of Nebuchadnezzar, compounded of heterogeneous materials? Shall we bend the knee or be cast into the fiery furnace? As to authority, examine from book to book down to Judge Tucker, and it will be found, however generally the doctrine may be laid down, that it will not admit of the interpretation for which gentlemen contend. Did not the learned Hale take up the doctrine and except to its general import? He was known to understand it well, and he has distinguished between accessorial and other treasons, and explained the necessity of attending to the distinction in prosecutions; that the principal must be proceeded against before the accessorial treason. Does he not say, that those who commit the very fact of treason must be tried before the principals in the second

degree? Though, as far as the equality of punishment is concerned, all are principals in treason, yet the trial of the principal traitor should precede that of the accessorial agent, or, if tried together, the guilt of the principal must be proved to the jury before they inquire into that of the accessory.

Lord Coke, a lawyer without precedent, and an attorney-general without a heart or feeling, lays down the doctrine generally. But Foster explains it fully, and refers to Hale. The term treason, as well as the term felony, is a term well known at the common law. It is well known, that when the word felony is spoken of in a statute, it is intended to have the full definition of felony at the common law; but it is very different when a statute uses a phrase not known to the common law at all. The term, when used in such cases, is adopted *pro hac vice* only, and not extended by relation further. Perhaps the same may be said of treason. But you cannot adopt treason. The constitution has adopted and defined treason, and says wherein *only* it shall consist, and has restrained the legislature from further defining or extending it. But if you insist that the constitution intended to adopt treason, with all its incidents and circumstances at the common law, I ask you, what is treason at the common law? It is an invasion of the regal prerogative. Would the objections to the constitution have ever been overcome, if it had been supposed to adopt this dangerous common law definition of treason? It was intended in the constitution according to its true modern and rational meaning. The word *only* refers to the *person levying* the *war*, as well as to the *war* itself, and is completely exclusive of all other than personal actors in treason. Leave it wholly, if you please, as it stands in the constitution, or, if you extend it, let it only be as it is in England itself, improved and deprived of its pristine rigor. Why is it in England that in treason all are considered as principals? *Propter odium delicti.* "The same acts that make a man accessory in felony make him a principal in high treason, *upon account of the heinousness of the crime.*" 4th *Tucker's Blackstone*, 35, 36. The judges found out this to be the meaning, and made it an extension of the doctrine directly. Can this

court indulge their antipathy, when the constitution says that treason shall consist in levying war only? Can you indulge this antipathy of the judges in order to bring the accessory into the predicament of a principal? I must entreat you to mix a little justice and humanity into the national policy before this antipathy be sanctioned. The true reason why the idea ever crept in, was because the principal source of the care of the judges was to guard the life of the king. To this they yielded with idolatry; levying war was generally treated as an overt act, and thus both, that is, levying war and compassing the king's death, were coupled together. Old precedents are not so numerous as could be wished, because counsel make it shorter work by turning *levying war* into *compassing*. I believe ninety-nine cases out of a hundred, if not nine hundred and ninety-nine out of a thousand, rose from compassing the king's death. It is from that source, sir, that all the mischief has sprung; and from this the doctrine of constructive treason was extended. But how does this doctrine stand with the benignant principle of law, that all penal laws ought to be construed strictly? Does not this suggest the propriety of questioning the rule, that all are principals as applied to the United States? Is inference only to change the nature of crimes? But are accessories to be unpunished? Here we recur to national policy. If I were to say "*yes*," if there be no law, it would be correct to the ear of the court, though not to the popular ear.

It could only be deemed a *casus omissus*, the nature of which is well known, and can only be supplied by the legislature. It appertains not to you to rectify it. If courts were to undertake to supply omissions by the legislature, it would justify the apprehensions and jealousies formerly entertained against the judges. I remember that while this part (the judiciary) was under debate, some conversation passed respecting the propriety of restricting the powers of the judges; and it was remarked by some that they would, if unrestrained, indulge themselves in making inferences, supplying omissions, and assuming authority not properly belonging to them; that they might control the legislature, become tyrannical, and even become more than *ephori*.

Mr. Wickham has anticipated me in some important remarks, which I intended to make with respect to accessories. Congress, in the law which they passed for the punishment of certain crimes against the United States, have spoken of accessories in some clauses and omitted them in others, and in the 11th and 16th sections of that act have pointed out inferior modes of punishment. These and other clauses of that law show that the legislature thought that there were no accessories in treason, punishable as such by the constitution. Who knows what were the precise sentiments which prevailed when this subject was under discussion? It should be construed by the words, and the words only, of the constitution. If you adhere to, and preserve inviolate, this constitution, you give security to yourselves and peace and safety to the nation. Having closed this point, I come now to the third question. In whatever manner an accessory is to be treated, though even as a principal, yet the mode in which he becomes so must be specified in the indictment. It is not enough to say that he is a principal; it must tell us *how* he has become so. It is not sufficient to make an inference of law, that he is a principal (for of what use would such a notice be?), but it must tell us the facts with which we are charged, that we may have it in our power to understand clearly the specification of the overt acts and to defend ourselves against them. In the first place, we do not wish to know what the conception of the law is on the part of the prosecution, but what the facts are. Of what use would the provision concerning the overt act be, unless the law were to be complied with, by specifying the same in the indictment? Could it otherwise operate as a notice? You sap the foundation of justice when you say that all are to be considered principals in treason, and yet fail to explain in the indictment the manner in which it is intended to prove they became so. Suppose, in this case or any other, a person were to be generally charged with three separate acts, which were in truth done by others, at different times and places: which is he to infer from the indictment? He would be a traitor with respect to each separate act. The indictment, instead of distinguishing to whom he was accessory, or whom he aided

or abetted, charges him generally with the guilt of treason. Will the assignment of the place enable him to infer which of the three acts of treason is contemplated? Is it the first act of treason charged that he must defend himself against? or is it the second, or the third? It is impossible for him to foresee. This indictment will answer for all; the prosecutor has nothing to say, but that the accused arrayed a military force on Blannerhassett's Island, and the accused is to shape his defence to what does not appear. The laws of his country have only called on him to defend himself, but have not apprised him against *what.* He must sit down and conjecture which the charge is. Where is he to obtain information? Is he to write to the president or to the federal judge, or to the public prosecutor? He is to come to this place, many hundred miles, under a guard. And when he comes, he is told that he is considered a different man; that he is to be responsible for the acts of others; that if the indictment be good in form against him, stating him to be present and acting in person, though absent in fact, no exception can be taken in his favor on his trial; that they do not mean to deny that he was not *then* (when the overt acts were committed) in that country where the scene of action is charged; but that this is immaterial; he must submit to a trial in this form, however much it may surprise and oppress him. This form of trial is not only unjust in itself, as it operates as a surprise, but is contrary to all precedents, which uniformly state the *manner* of advising and countenancing and other conduct which make a man an accessory and punishable as a principal in treason. It has never been attempted in this country, or even in England, to prosecute in this manner. In first *State Trials*, 130, when, in the year 1586, John Ballard and others were indicted for conspiring and advising to kill the queen, invade the realm, and deliver from her confinement Mary Queen of Scots, the manner of advising and aiding, in order to effect those purposes, was specially and most minutely set forth in the indictment.

Idem, 163. In the year 1589, in the prosecution against Howard, Earl of Arundel, for high treason, the mode of advising and countenancing is also fully specified.

Idem, 187, on the trial of Sir John Perrot for high treason in compassing the death of the queen and conspiring to assist the Spaniards when they should invade the kingdom, &c., the manner of counselling, &c., to effect these treasons, is particularly detailed in the indictment. It is so also in all the other State Trials, and is confirmed by Foster and by 1 *Hale*, 238. I have not gone beyond the State Trials, but I have undertaken to say, by taking cases occasionally and from different books, that in all of them, where the treason is of an accessorial nature, the *manner* of committing the accessorial acts is specified.

This is the short question, whether the law *then* and *there* is to be more mild than the law *here* and *now?* whether the law shall be adjudged to be more lenient in those days of bigotry and barbarism than in these enlightened days, honorably distinguished for improvements in the science of government and for predilection for the principles of justice, morality, and philosophy. We have all the analogies of the books on our side of the cause. For instance, in the case of a petit treason. When a man is murdered by his wife or servant and by another person, you will find that the form of the indictment begins with the principal in the first degree and ends with the principal in the second degree; and that it very rarely, if ever, begins in the first instance with charging the principal in the second degree. It is also the same in murder. Suppose two persons charged with murder: one made the assault, or gave the blow, and is called the principal in the first degree; and the other was present aiding and abetting, and is called principal in the second degree. How is the indictment drawn? It charges that such a person did make the assault, or did give the mortal wound, and that the person who is principal in the second degree was present, aiding and abetting, &c.

I shall not say, when I refer to *Foster*, 355, 356, that I am quoting a case which is applicable to this case in all its circumstances, but I shall derive from thence what will establish my principle.

"Cases without number may be cited to show in general how extremely tender the judges have been in the construction of statutes which take away clergy, some-

times to a degree of scrupulosity, excusable only in favor of life." With regard to the *allowance* or *non-allowance* of clergy, they have carefully distinguished between the cases of principals in the first and second degree, the actual perpetrators and mere aiders and abettors.

"In the case of The King against Page and Harwood, upon the statute of stabbing, which enacteth that if any person shall stab or thrust, &c., these defendants were present, aiding and abetting a third person, not named by the reporters, who in fact did make the thrust, and was denied his clergy. But the defendants, though agreed to have been principals in manslaughter at common law, were admitted to their clergy. For, saith the report, though, in judgment of law, every one present and aiding is a principal, yet in the construction of this statute, which is so penal, it shall be extended only to *such as really and actually made the thrust; not to those who, in construction of law only, may be said to make it.*" The reason given for this exemption of the persons aiding and abetting is because it is a severe law, and its punishment ought not to be extended by construction. It applies to all laws inflicting capital punishment. They may allege a distinction between the prime mover and his inferiors. How can the prime mover better inform himself, amid acts imputed of various persons, than the subordinate agents? Reason is stronger that he should be specially informed of such acts of theirs, as he is to be charged with. Mr. Wickham has commented very aptly on the words of this indictment. It leads us astray, it excludes all subordinate agents, and deceives us into a belief that Colonel Burr is charged as a principal, actually present at the scene of action. It does more. In the manner in which it is drawn, it deprives us of the blessing intended us by the constitution, a jury of the vicinage, because it is not known where it is to be located till the trial; and then, though discovered not to be from the place where the procurement originated, as the act of Congress requires, it is too late. The accused, for instance, is to be tried at Richmond for a fact perpetrated in Wood County, by another, but said to be procured by him in Kentucky. From whence shall he have his jury? From Wood County? They answer, that the accessorial fact is to be

tried where the real fact was committed. But is not this an evasion of the constitution, which provides that a man shall be tried speedily by an impartial jury of the state and district where the offence or crime shall have been committed? The fact with which he is chargeable was done in Kentucky, where the constitution presumes his character and the characters of the witnesses are better known, and where the alleged facts will be more impartially examined. We speak, as we have a right to do, on general abstract principles. You deprive him of all the constitutional benefits of locality as to his trial. You try him where his good character among his neighbors will not avail him, and where the jury's knowledge of the witnesses will be equally unavailing. I know not what *dicta* may be somewhere found upon this subject, but I am confident that no adjudged case can be found to justify this prosecution. If any *dicta* could be produced, we would oppose to them reason, justice, precedent, and analogy.

I come now to the fourth point, that the principal must first be convicted. Mr. Wickham read yesterday a case from Foster, to show that the principal must be tried before the accessory can be put upon his trial, unless he waive it. An objection, which is sometimes made to this doctrine of previous conviction, aids this idea; for how can the accused else determine whether to waive and go to trial? What will be the consequences if this doctrine be sustained? By laying the offence in Wood County, you make it impossible for him to be tried till the principal shall be tried and convicted of having committed the act, where laid. It is perfectly clear that this indictment is radically wrong, as applied to this case.

I do not wish to repeat what Mr. Wickham has already commented on, and shall satisfy myself with his remarks; but I will observe that if the previous conviction of the principal offender be not necessary, then the government may wait till the death of the principal, when the accessory may thus be deprived of the main chance of his defence and unjustly oppressed. No man will believe that our government is capable of anything of the sort, but there may be a time hereafter when these oppressions may be practised; they should therefore never be

tolerated, but prevented from the first from being attempted. If the accessory may be convicted without the principal, then the accessory may be brought to trial after the death of the principal, and convicted on evidence which if used in the life of the principal could easily have been disproved or repelled. Will you put it in the power of your government thus to trample on the rights of your fellow-citizens? The chief of the government may persecute the man who is the principal object of his hatred. If he can avail himself of a difference of principle, and render him suspected and hated, he may destroy him. These observations may not apply to the present times, but what you may now do may be drawn into precedent.

In England, if the principal stand mute, the accessory cannot be convicted, because one chance in favor of his innocence and acquittal is thereby taken away. Would you wish to have our privileges less secure, or our liberties more liable to invasion, here than in England? Would you suffer the accessory to be tried, without a previous trial of the principal, except in cases where the acts of the legislature had provided otherwise? I have had occasion to mention Lord Coke before. What would not he have done, if such a doctrine had prevailed in his time? What might not Bacon have done? Bacon, a man of still higher renown, whose name might have been immortal had he not degraded himself by becoming the instrument of his master's tyranny, and descended to other improper conduct. Bacon was once attorney-general, and submitted while he was to the mean and debasing drudgery of sounding and corrupting the judges, at the instance of the king, in order to insure the success of a prosecution for treason against Peacham. In his letter to the king he said, that "as to three of the judges he had small doubt of their concurrence; neither, saith he, *am I wholly out of hope, that my Lord Coke himself, when I have in some dark manner put him in doubt* that he shall be *left alone, will not continue singular.*" When such a man as Bacon, who might have been an ornament to his species, prostituted his character and talents to so vile a purpose, it is difficult to say of what human nature is capable. We cannot guard too much against the oppressive abuses that may result from constructive trea-

son, or against the introduction of precedent, susceptible of such pernicious limitation. If the accessory could be prosecuted without the previous conviction of the principal, what oppressions may not be practised! I have no reason to believe that there is the smallest danger, here in America, that such oppression will ever be attempted; but we should vigilantly guard against and oppose the first step leading to such doctrines. It is admitted that the precedents, charging accessories after the fact, are special, and set forth the manner of becoming such. But they are principals as well as accessories before the fact; the reason which requires a specification in the one case, equally demands it in the other. The pre-existence of fact is as necessary in the one case as in the other. What produces any difference of rule between them? What is the reason of the law in requiring a specification of charge against the accessory after the fact? Is it because he is a principal, or because a party accused should be apprised of the nature of the accusation, that there should be a conformity between the charge and proof? They admit that in case of the accessory after, the facts which render him so must be plainly stated in the indictment, in order to enable him to meet the charge with his defence, and yet the doctrine of the gentleman is, that they are not obliged to do so with respect to the accessory before the fact! The reason is the same in both; there is no distinguishing between them; but if there were any distinction, it must be, that it is more necessary to specify the charge, in case of an accessory *before* the fact, where the consequences are usually so much more penal, than in that of an accessory *after* the fact, where there are less. With respect to our having come to trial without stating the objection, we could not avoid it. The charge against us was so general in the indictment, that we were driven to this mode of defence; for how can it be said that we have waived any legal objection relative to what is not charged, and of which we have the first notice from the arguments of gentlemen? Had they stated specially, that they intended to *affect* Colonel Burr, by the acts of others, committed in his absence, and without their previous conviction, we should then have been distinctly

apprised of what they would attempt to fix upon us, and of the extent of our right to oppose them, and we might or might not, as we thought proper, have waived our objection ; but as we have not been thus duly notified, we are driven to this scheme of defence, unintentionally. All the difficulty in the case is produced by the imperfect manner in which the indictment is drawn, and still more by the imperfect manner in which the prosecution is conducted. By these means, the accused may generally be misled to part from the essence of his defence.

How is Burr to defend, as to Blannerhassett ? All communications between them were prevented, and consequently the opportunity of acting. Shall fiction, converting the accessory into a principal, rob him of the means of just defence ? The maxim is against fiction in criminal cases, as has been already sufficiently explained. Consider the inconveniences and oppression of such a mode of prosecution. A trial comes on against a person charged generally as present and acting a traitorous part at the scene of action described in the indictment. The trial is commenced : it is then discovered that the accused had only performed accessorial acts, and in a different district from that charged. What is to be done ? Can they stop ? Can they adjourn for months and coop the jury in the interim ? All these inconveniences may be avoided by prosecuting in the correct and usual way ; specifying in the indictment, in explicit terms, the specific offence which it is intended to establish on the trial. Tell us how we are to be prosecuted ; under what law. Whether we must come to defend ourselves as principals or accessories. Whether we are to be tried according to the supposed maxims of common sense or the principles of national policy, deemed orthodox in political circles or on the theatre of legislation. Let us know the ground on which we are to stand, whether force must be used ; or whether the most peaceable demeanor cannot secure from the effect of guilt. The consequences of the doctrine of gentlemen, if adopted, must be uncertainty on all these points and the impossibility of making an effectual defence, against an accusation which may be brought against any man by surprise. I trust, therefore, that our motion will prevail.

Mr. Hay expressed a hope that the discussion of the questions submitted to the court would be postponed till next Monday, in order to give time to the counsel for the prosecution to reflect on the subject and enable them to answer the elaborate arguments of the counsel for the accused; which, having occupied two whole days in the delivery, must have been prepared with infinite labor and industry. He said, however limited his experience in criminal prosecutions, he had no doubt that he would satisfy the court that the motion could not be sustained, if he had but time to refer to authority and consider the subject; that on so important a question, sufficient time ought to be granted; that it was an attempt to wrest the question from the jury, the proper tribunal, and to divide them from the court.

Mr. Wickham, *Mr. Martin*, and *Mr. Botts* objected to so long a postponement, and said that the counsel for the United States ought to have come prepared to prosecute, and to understand and repel every argument and every defence of which the cause was susceptible; that the season was sickly, accidents might happen, and it was cruel to confine the jury longer than was absolutely necessary; that they could not understand how to reconcile the gentleman's declarations, that the cause was clear for the United States, and that the motion could not be sustained, with his request of a postponement till Monday to reflect on arguments, which he seemed to be confident were susceptible of such easy refutation; that it could not be justly called an attempt to divide the jury from the court; that it might be said more correctly, that by the prejudices which had been so industriously excited against the accused, and even the court, it was attempted to divide the people from the court; that it was exceedingly improper to utter any sentiment calculated to excite the resentments of the jury. *Mr. Botts* referred to the time occupied in the trial of Hardy, &c., the long, elaborate, and able defence made by Mr. Erskine, and the promptitude with which counsel on one side answered the arguments of those on the other side of that prosecution. He also referred to the zeal and perseverance with which the counsel for the United States had, in a preceding stage of this very prosecution, urged the neces-

sity of the court giving an immediate opinion, in order to satisfy the people of Virginia; that he was silent himself at the time, but as it appeared to him to be in a style of threat to the court, it made a lasting impression on his mind.

Mr. Hay and *Mr. Wirt* replied and enforced the same arguments which Mr. Hay had before used. They particularly observed that it was presumable that an argument which occupied two whole days in delivery to the court must have required considerable labor and reflection to arrange and digest it, and that it was unreasonable to suppose that such an argument could be fully comprehended by a preparation of one day; that five or six gentlemen of great professional experience were united in the defence; that this motion might be considered a mere "*ruse de guerre;*" that they sprang on the counsel for the United States as from an ambuscade; that the mere consultation of the authorities relied on by their opponents, without further reflection, would require more time than those gentlemen were willing to allow them; that as it was so very important a question, as gentlemen themselves could not but admit, that if the motion succeeded there would be an end of the cause, the court must feel every disposition to grant the necessary time to enable the counsel to do justice to those whose interests they had engaged to support; that they could not well conceive how gentlemen could reconcile to themselves to make any opposition to such a motion.

The court granted the motion, and the argument was postponed till Monday accordingly.

MONDAY, AUGUST 24, 1807.

As soon as the court met, *Mr. Randolph* said that he would make one observation which he had omitted, concerning the constitution of the United States, as bearing on the point under consideration, that "the *accused* had thereby a right to know the nature and cause of his accusation;" that if this constitutional provision were ever to be enjoyed, it ought to be when an indictment was exhibited against him, involving his reputation and life; but this indictment gave him no such information. Instead of charging him with an act of procurement as an

accessory, it misled himself into a belief that he would only be prosecuted for his own acts.

Mr. Mac Rae.

May it please your Honors, —

The counsel for the prisoner, in delivering their arguments at a very great length, made, as far as I could comprehend them, two points in support of their motion; for though in form more points were detailed, yet in substance I understood that they considered the success of their motion as dependent on the establishment of two points only. First, that the accused not having been present at the commission of the overt act, no evidence can be adduced to prove his connection with that overt act. Second, that the overt act charged not being proved to the satisfaction of the court, no evidence of any other overt act can be adduced in support of the indictment. Those who are concerned in this prosecution must feel a conviction that the object of this motion is to exclude from the court and jury all the traitorous evidence, and to prevent us from proving the crime which is charged against the prisoner, at this stage of the proceedings. I wish, sincerely wish, that no motion had been made which would impose on me, as this does, the necessity of exposing freely my opinion of the guilt of the prisoner. It was my anxious wish to have postponed all remarks of this kind till all the evidence should have been fully and completely laid before the court and jury and the people of this country; but since this wish cannot be gratified, I hope that I shall be excused, in the discussion of this important question, whether the accused be guilty or not, for expressing my belief that he has committed the offence for which he is indicted, and following the course which the counsel for the prisoner have prescribed to me.

Before I answer their arguments I deem it proper, if the court will permit me, to take a short view of the strange manner in which this defence has been conducted. We blame not the prisoner for exercising any of those rights which as a citizen he is entitled to, and which it were perhaps a violation of duty not to exercise; and no man's talents are more competent to distinguish and assert his rights than those of the accused. We object

not to his making any such motion as rightly belongs to his defence. But the prisoner, for the purpose of escaping the effect of the prosecution carrying on against him, has with unexampled dexterity contrived from the very start, almost invariably, to quit his situation as an accused. On every occasion, from the commencement to this present moment, instead of Aaron Burr defending himself, we find him taking the high ground of public accuser, and assailing others. The highly respectable officer who apprehended and conducted him to the place, the only place recognized by the constitution and laws as proper for his trial, has been abused and calumniated for this important service. A meritorious officer of the United States, for detecting and exposing this conspiracy, and for risking his fortune, his life, and honor to save his country, coming hither as a witness to give testimony in favor of that country, is instantly attacked by the prisoner. He attacks him for an offence alleged against him, but not proved; not for the commission of a crime, but for a course of conduct which need only to be expressed to receive the highest eulogium. The public functionaries themselves, to whose vigilance, wisdom, and patriotism, the people of the Union are at this moment indebted for the rights they enjoy, for their security against a plot of treason, equally foul, cruel, and formidable, which would not have left a trace of our liberties undestroyed; these public functionaries have been denounced by the prisoner, and he has attempted to persuade the public that they ought to be considered as persecutors and enemies to the liberties of their country.

Sir, it requires no great strength of discernment to perceive what was the prisoner's object. The development of this treasonable plot had deservedly excited the abhorrence of our fellow-citizens universally throughout the country. It was a bold undertaking; but if he had succeeded in his daring and treasonable project, however his views of ambition might have been gratified, he would have been justly execrated as the destroyer of the freedom of his country. The savior of his country, who has prevented the execution of this detestable plot, in proportion as he has deserved well of his fellow-citizens, has incurred the hatred and resentment of the prisoner

and his associates. The patriotic and meritorious officer (like those who opposed and overthrew Catiline, the Roman conspirator), who defeated this daring scheme against American liberty, will not be forgiven by the conspirators.

But I beg you to observe a little more of the prisoner's conduct. Before the arrival of General Wilkinson, I need not take notice of the repeated and strong insinuations against him, both in and out of court, that he would never dare to come; nor need I mention the proceedings against him after he had arrived. Before the indictment was sent to the grand jury, and after it was sent, but before it was known what would be the result of their inquiry, a proposition was professedly made to influence their deliberations, to prove that the accused was innocent; we were fairly challenged to come forward with our indictment, and informed that the prisoner was ready prepared to meet all the evidence against him, and to prove his innocence to the world. Finally the gentleman from Maryland, speaking in very strong language, and appealing to his innocence, used these very expressions, that "*his honorable friend was as ignorant and innocent of the offence charged against him as the child unborn;*" and further, the last gentleman who went before me expressed his belief that Aaron Burr knew nothing of the overt act committed on Blannerhassett's Island. I heard him say so. I am willing to make a reasonable allowance for the impressions made on the counsel by his representations. If he be innocent and pure as the child unborn, if he know nothing of the transaction, why is it that this motion is made to exclude the evidence? Will the exclusion of this evidence seal the lips of one hundred witnesses? The principle of defence now is *ignorance* and *innocence;* what has become of all this boldness with which we were at first amused? Now, when we are ready with our evidence, they come forward with this motion. Will this place the gentleman on the high and honorable ground on which innocence ought to place him? Common sense has been appealed to. I will leave it to common sense to answer this inquiry. I have thought it my duty to express my opinion concerning the guilt of the prisoner. We have just received information of further evidence ready to be adduced, in order

to satisfy the court and all who hear me, that the probability of his guilt is not lessened, nor can this motion, however decided, diminish that probability.

I will proceed now, sir, as well as I may be able, to answer some of those arguments which were urged by the counsel for the prosecution. I hope I will not be considered as wanting respect for one of those gentlemen if, in the course of my observations, I should mention another gentleman more frequently than himself. It may suffice to say, that, as they generally relied on the same arguments and authorities, to answer one will be to answer both.

I trust that the confidence with which the gentleman who made the motion declared himself able to demonstrate the positions which he laid down, will not diminish the difficulty of his task, or induce a less scrupulous inquiry into the correctness of his arguments. It is true, sir, that I have not devoted that time and attention to the consideration of those particular questions which he has presented for the decision of the court which I would have wished, and which their importance required. It is evident to the court, from his volume of notes, and may be to all the world, that he has bestowed much time and attention on the subject. I presume that the confidence with which he declares himself convinced that his motion ought to prevail can have no effect. I am most perfectly convinced, though he has expressed himself with the most remarkable earnestness, that he is mistaken. Though I might not feel disposed to express myself violently in opposition to what he has so seriously advanced, yet it is my duty to myself, as well as to truth and justice, when I entertain a different opinion in this or any other case, whether professionally or any other way, firmly to assert and as ably as I can to support that opinion. I trust it will be seen by the court, when it examines their arguments and authorities, that those authorities do not contain or warrant the doctrines they contend for, and that we shall be able to show directly the reverse.

He has stated, that according to the constitution of the United States, the common law of England or the law of the United States, as Aaron Burr was absent at the time

when the act was done, he cannot be convicted on this indictment; and that the rules of construction which apply to common statutes ought not to be used with reference to the constitution. I apprehend it will be sufficient for me to show, that the language of the law of England and of our constitution is the same on this subject. Before I call the attention of the court to the third section of the third article of the constitution, which Mr. Wickham read, I hope, as an appeal has been more than once made to that devotion and attachment to the constitution of the United States, which every good citizen ought to feel, that I may be excused for saying, on my own account, that I feel as much reverence and affection for the constitution, as the pledge of the happiness of my country, as any man; and that I am as much attached to the principles of our government as he or any other man can be; and I trust I shall at all times feel it my duty to maintain the constitution against all encroachments to the best of my ability and judgment. I am perfectly convinced that the gentleman wishes to defend the constitution and laws of his country, and that he has those patriotic and generous feelings which he has described to the court. But on the present occasion he must excuse me for saying, that it is more incumbent on the counsel for the prosecution, than on those of the accused, to defend the peace, safety, liberty, happiness, constitution, and government of this country; and, when I recollect that the administration has these for its objects, I have no doubt, that while it will do justice to the public, it will also do justice to the accused; and if efforts should hereafter be made to subvert the government, it will continue to be faithful and vigilant in detecting and defeating them; and will inquire into every case, according to its real merits, so that law and justice may be truly administered.

Mr. Wickham read the third section of the third article of the constitution, in order to prove, that under the constitution the prisoner cannot be convicted of the offence of which he is indicted: "Treason against the United States shall consist *only* in levying war against them," &c. Mr. Wickman is apprehensive, I presume, that some inferences may be drawn unfavorable to the prisoner from the interpretation which has been given to the statute 25

Edward III., and might be applied to this case, because the words of the constitution and the words of the statute are the same. He stated that the construction of the constitution and of the statute must be different. I acknowledge to the court, that though I listened to him, as well with respect as with pleasure, yet I could not see any reason for the distinction he attempted to establish ; for if the words in both be precisely the same, and the words of the statute have been (as is admitted) correctly expounded, the interpretation of the constitution ought to be in the same way. Whatever may be the correct construction of the constitution, and whether the statute have been correctly construed or not, yet it must be admitted that the correct interpretation of the one must be the correct interpretation of the other. It is immaterial to me how they consider this subject, whether under the constitution or statute or common law of England, but the argument does not apply to this case. Absence from the scene of action does not comprehend such a case as is now before the court. It is possible for a number of men to be concerned in levying war against the United States, and yet be absent from the spot when the overt act laid in the indictment may have been committed.

This obliges me to speak to the court of the nature of our evidence, which they wish to exclude ; some of which the court has already heard. I hope that the necessity imposed on me to speak will be regarded as my sufficient apology for any remarks I may make explanatory of, or relative to, that doctrine.

Chief Justice. — You have a right to suppose any act compatible with the absence of the accused.

Here a desultory conversation ensued, in which Mr. Burr observed, that the testimony relative to the acts on Blannerhassett's Island was to be excluded, because it was irrelevant ; and Mr. Wickham insisted, that if the most positive evidence in the world could be adduced in favor of the prosecution, yet, as Colonel Burr was not *then* on the island, the law was in his favor ; and Mr. Hay insisted, that this depended on the evidence itself, which ought to be heard before any correct opinion of its effect could be formed.

The *Chief Justice* observed, that as the motion was

predicated on the ground that the accused was not actually present on the island, and this was not denied, no argument could be correct that supposed him to be actually present.

Mr. Mac Rae. — I suppose I may be authorized to speak of the testimony actually examined. The evidence is such as, if it were adduced before the court, would serve to show that the first position laid down by the gentleman cannot be maintained. Though the prisoner was not at Blannerhassett's Island when the overt act was committed, yet he is guilty of treason if anybody be guilty. Is there any human being, who, having heard the evidence of General Eaton and Mr. Henderson, the evidence of the Messrs. Morgan, and the evidence of the witnesses who speak of the overt act on the island, especially Jacob Allbright and Peter Taylor, who can doubt of his guilt? Is there a human being who can doubt of the prisoner's intention to commit treason? The jury are legally authorized to draw inferences from facts proved to them. This would produce an essential difference between their conclusion and what the counsel for the accused wish to consider as correct. All the witnesses are credible; and Eaton's evidence is to the point. It is not necessary to repeat it all, because the court took notes when he was examined. General Eaton informed the court that Aaron Burr described the present administration in terms far from respectful, as weak and inefficient, wanting both energy and talents; but this he postponed for a considerable time. General Eaton had a fair claim against the government, and he was dissatisfied at its being withheld. This was a circumstance known to the prisoner, which he was authorized to believe rendered him not very friendly to the administration. What did he do? After planning and plotting, and satisfying himself that such a plot as this, conducted with a great deal of art, of secrecy, and of management, might possibly succeed, he commenced his inquiries with this gentleman; and took care to remind him how extremely improperly the government had treated him. He had the art of working his resentment, already inflamed, to a still higher pitch. Cautious in every step (for no man has a more comprehensive knowledge of human nature), he pro-

ceeded by degrees, till he thought it would be safe to mention his plans to Eaton. *At first* he said not a word of treason; his conversations related to an expedition against the Spanish territories, with an intimation that it was probable we should have a war with Spain; that the prisoner should be the chief commander, and that he would give a distinguished station to General Eaton, who was disposed to serve his country in any enterprise that was honorable or beneficial to her interests. He was willing to take the station pointed out for him, believing it was sanctioned by the government, the prisoner artfully adapting and changing his conversations to inculcate that belief; sometimes speaking of the Mexican expedition, and sometimes of the government. Feeling General Eaton's pulse, and offering him prospects of wealth and emolument, he advanced step by step, till at length, fancying that Eaton was disposed to join him (having deceived him in that respect), he came out with strong denunciations against the government. When you have heard from a respectable witness, that he proposed to him to join him, but that he rejected his proposals, and would not be concerned in the expedition; that the first bold and daring step would be to dismember the American confederacy; that New Orleans should be seized and made the seat of the new government; and that the Alleghany was to be the dividing-line between the eastern and western governments, — I say, when these things have been heard, is there any man who can doubt that the prisoner entertained treasonable intentions? When you proceed further and examine the evidence of the Morgans, fully connected with that of Eaton, is it not obvious that this was the object which he never ceased to cherish? The court will recollect the testimony of Colonel George Morgan and his sons: the contemptuous manner in which he spoke of the weakness of the government, the number of men which he deemed necessary to subvert it, and the certainty that the western country would be separated from the eastern in a very short period; his designating on the map, when conversing on this subject, on which his mind never ceased to dwell; his anxiety to engage young Morgan to join him; his discouraging reflection against his study of the law;

his coming down stairs at eleven o'clock at night ; his beckoning to him to go out with him ; his inquiries and conversations about military affairs and young gentlemen ; his manifest chagrin when he found that he could make no impression on the old gentleman, and that nothing could be got out of him ; all these and other circumstances concur to show the views of the accused.

The evidence of Commodore Truxtun, too, as it relates to the intention, is in my mind very strong. He gave an account of two or three conversations with him : that he wished to create a navy, of which he was to be at the head ; that he wished him to be unwedded from the navy of the United States. He spoke of the weakness of the government and the expedition to Mexico. He said at one time, that the government must be involved in a war with Spain, but admitted that the president was not privy to the project in which he was concerned ; that he wished to *see* or *make* him an admiral. Gentlemen rely much on the word "*see*," but there can be no sort of question that to "*make*" him an admiral was his meaning. He had told him before to think no more of those men at Washington, and to be unwedded from the navy of the United States. If, then, he became an admiral, he must be of the prisoner's making. I have thought proper thus briefly to mention the evidence, to show the intention of the prisoner at various times, as far back as the preceding winter or fall ; and in July following, when going to the western country, he passed by the residence of this respectable gentleman, Mr. Morgan. It ought not to be forgotten, that when they were on Blannerhassett's Island, there was a little more than mere intention. I do not say that the accused was there when the overt act was committed, but he was there once or more before. This is proved by Mr. Woodbridge, the witness who proves that he entered into a contract to supply him with flour and provisions, and to build boats for him. Blannerhassett here appears deeply involved in the treason. When Aaron Burr went for the purpose of making a contract for provisions and boats, and Mr. Woodbridge began to doubt the certainty of getting payment, he was displeased, and asked him if he doubted Colonel Burr's honor ; and he pledged himself to see the provisions, &c., paid for. Why did he go to

the island? Why did he make this contract about the boats and provisions? We do not require the court to decide on this evidence. That belongs properly to the jury, and not to the court. We do not wish to take from the jury what properly comes within their exclusive jurisdiction, or to wrest from the court what is its province alone to decide. Suppose we can prove, that when Aaron Burr went some distance below Blannerhassett's Island, he had a number of men and a very considerable number of arms in his possession. Suppose we can prove that these people were at his instance brought together to Beaver, and then at his instance also went to the island. Suppose we can prove that he met them by previous appointment at the mouth of the Cumberland, to take command of them; that a junction was formed between the two parties there, and that in the mean time they were considered as under his control and subject to his directions. Suppose we can prove, that the prisoner at length, understanding what was his own dangerous situation and that of the people with him, said to them, "*Fly for your lives, or the Philistines will be upon you*," and that they did fly. Suppose we can also prove, that going farther down the river towards the seat of his fancied empire, and hearing that the militia of the Mississippi Territory would prevent him from succeeding in his project, in this situation he became more afraid, put his arms in boxes and sunk them in the river, but artfully attached to the bottom of the stern of the vessel, in order that those who came on board should not see them; and suppose we can, in addition to all this mass of solid testimony, prove that he afterwards acknowledged that his project was defeated by General Wilkinson. Ought we not to be permitted to lay all this evidence before the jury, and endeavor to demonstrate to them that an act of treason has been committed? Will any gentleman doubt that Aaron Burr had thoughts of committing treason? Some gentlemen, indeed, say, that they doubt whether any evidence in the world can convict him, as he was not on Blannerhassett's Island at the time laid in the indictment. But this I will endeavor to show is erroneous.

I have examined the authorities to which the gentleman has referred, but I do not see that they justify the

inferences which he has drawn from them, or countenance the doctrine which he has labored to establish, at least to the extent which he contends.

Even in England, a person standing in the situation of the prisoner would be held and indicted as a principal, and not as an accessory, as the gentleman supposes. If these things have been proved on the prisoner, if an overt act have been committed on Blannerhassett's Island, and war have been hereby levied against the United States, I should hold it to be indisputably clear that Aaron Burr was guilty of levying war against his country. I cannot see how it is necessary that he should be there, if he enlisted the men and sent them to that place, and acted himself in another. If both belong to the same party, if he be leagued with them, and coming towards them to assume the command, it does seem to me that all these things are to be considered as so many different acts of the same treason; and any one person who is guilty of any one overt act, is guilty of all the others; and I trust I shall be able to prove to this court, that this is the law of England and this country, notwithstanding the confidence with which the gentlemen on the other side aver the contrary.

Mr. Wickham said a great deal to prove, that if the prisoner were to be considered as in any degree guilty, he ought to be considered only as an accessory, and specially indicted as such; and he denounced in very strong and very proper terms some decisions in England, which I think were indeed so horrid and disgraceful, that I cannot but express my abhorrence of them, though the gentleman seemed to think that we should rely on them.

With the leave of the court, I will mention the first case which he mentioned, and which he only read, as stated in a note to the 4th vol. of *Tucker's Blackstone.* I mean the case of Throgmorton.

As this case has been referred to and listened to by many gentlemen who were present, and the reading and comments may have made some unfavorable impressions against us, I will take the liberty of reading the case, for the purpose of showing two things: first, that there is a great difference between the courts in this country and

the commissioners in that case appointed to try Throgmorton. And a reference to the very situation of the prisoner himself, and the privileges he enjoys on his trial from our constitution and laws, forms a striking and honorable contrast to the arbitrary proceedings before those tyrannical commissioners. And secondly, to show that it has nothing to do with this case, as they are entirely dissimilar.

[Here *Mr. Mac Rae* read nearly the entire report of this case, but it is omitted here, because the substance of it is contained in the quotation made by Mr. Wickham from *Judge Tucker's Blackstone*, which see before.]

Instead of being tried by a regular constitutional tribunal, dependent on its honorable character and good behavior for its continuance in office, he was tried by those unfeeling commissioners, appointed by, and entirely dependent upon, the capricious will of their despotic sovereign.

Another important fact, which happened to that unhappy man, and which can never happen in this country, is, that he was deprived of the benefit of testimony in his favor ; that a witness whom he called to testify in his behalf was not permitted by the court to be examined, but was ordered out of court. That is one of the execrable cases which are relied on for the purpose of showing that this cause is not properly conducted. But it is impossible for Mr. Wickham or any other gentleman to see any resemblance between it and this case, tried in this country, where the excellent trial by jury exists in its purity, before a tribunal selected constitutionally for its wisdom and integrity, and sworn to maintain the constiution and laws, and the rights and privileges of their fellow-citizens.

That case is very different from the case at bar in other respects. Throgmorton had no counsel (he was obliged to defend himself, and a most able defence he made ; but this did not extenuate the injustice of his persecutors). Law books, and even an act of Parliament which went to his complete exoneration, were withheld from him. The confessions of others were read in evidence against him, without showing any connection between them, and without producing them in court, though they were in custody and could easily have been brought forward ; and a man

who was under sentence of death was admitted as a witness against him. Do any of these oppressive circumstances appear here? Has that case any reference to the case of the prisoner? Instead of having no counsel, he is defended by a greater number than any man ever was defended by in this country, and by gentlemen of the most distinguished talents. Instead of having no defender, he has six, and among them three attorneys general. One of them for many years was attorney general of the State of Virginia, and afterwards of the United States [Mr. Randolph]; another was the late attorney general of the United States [Mr. Lee]; another was attorney general of Maryland for a great many years [Mr. Martin]; and the prisoner himself was a long time attorney general of New York. How exceedingly unlike the case of Throgmorton, who had no counsel, and who, though he defended himself, was not patiently listened to by the court, nor allowed to defend himself as fully as he could have done. But in defending himself so well before the jury, he defended the rights of others still better. Throgmorton's witness was driven off. The witness of the prisoner has gone away; but it is very remarkable that some of the witnesses of the United States have gone off. I do not charge the gentlemen or the prisoner with having induced or having had any agency in their departure. One of our witnesses had drunk freely, and it is supposed that this accident occasioned his going off. We have been obliged to coerce another witness to remain. The difficulty in this case has been only experienced on the part of the United States. There is no sort of resemblance between this case and that of Throgmorton, as Mr. Wickham seems to have supposed. On what principle, then, can a comparison be justified between them. Mr. Wickham, in his argument, referred to cases of accessories before the fact; but instead of showing cases analogous to or really resembling the situation of the accused, he adverted principally to cases of receivers of traitors or accessories after the fact. Instead of attending to the cases of those who are accessories before the fact, in endeavoring to show, as he imagined, some analogy or resemblance between them and the situation of the accused, he has referred to cases of

receivers of traitors, and was pleased again to suppose that we relied on the decisions in the cases of Lady Lisle and Elizabeth Gaunt ; cases where accessories after the fact were indicted before the principals in treason. Whatever may be the law of England with respect to accessories after the fact, however disposed or inclined we may be to rely on British authorities, we intend to place no reliance on those cases, nor, indeed, to admit their validity ; we disavow them. Sir, we would not contend that persons acting in this character of receivers could be indicted and punished as principals in treason. Suppose an overt act were actually committed on Blannerhassett's Island, and that some persons concerned in that treason effected their escape into some other part of the United States, and were entertained with meat and drink by one who had no sort of agency in the treason (or was entirely ignorant of it) ; it would be an unfair construction to contend that such a receiver was or could be regarded as a principal in treason. This is a doctrine which we should not contend for, and it was unnecessary for Mr. Wickham to trouble himself with its discussion. Lady Lisle was tried before the cruel Jeffreys (as he is very properly called) for having entertained John Hicks (who was said to have been engaged in the rebellion) for a single night. His conduct was disgraceful and arbitrary in the extreme. He abused and almost frightened out of their senses some of the witnesses. He intimidated the jury, who were disposed to acquit her, and though he ought to have been of counsel for the prisoner, as she had no counsel, he testified and insinuated against her. In giving his charge to the jury, he expatiated on the evidence against her, but omitted what operated in her favor. Though John Hicks had never been tried, she was convicted and executed. Sir, we should never have received or urged this atrocious case as an authority.

The prisoner has never been regarded as an accessory before the fact. He is the first mover of the plot ; he planned it, he matured it ; he contrived the doing of the overt acts which others have done. He was the *Alpha* and *Omega* of this treasonable scheme, the very body and soul, the very life of this treason. This being his situation, it would be idle in the extreme in us to regard him

as an accessory before the fact. We regard him not as such, but as principal and chief mover of the whole plan. Mr. Wickham resorted to the authority of Foster, for the purpose of showing who may be called accessories and who principals; and that he who is an accessory is not indicted as a principal. He took it for granted that we could not show that the prisoner acted in any other manner than as an accessory. In illustration of his argument, he referred to the form of the indictment, in the 6th page of *Foster*, with the note subjoined; that it was used against all the rebels who were tried in Surrey (except one for special reasons). We do not see what is proved by this, nor for what useful purpose he introduced it. The statement of any one overt act is sufficient. A party prosecuted need not be indicted for every overt act of which he may be guilty or suspected to be guilty. Though not indicted for some particular overt act, yet he may be indicted for some other. For instance, we have supposed Aaron Burr guilty of an overt act at the mouth of Cumberland and at Beaver, as well as at Blannerhassett's Island: suppose we prove an overt act at Blannerhassett's Island; will it not suffice? If the persons really guilty at the mouth of Cumberland be not indicted for an overt act there, but at Blannerhassett's Island, it will not be material; it will be sufficient, I should suppose, to indict them anywhere. To indict them for any one overt act is amply sufficient, as they are but different parts of the same treason. If the accused be indicted for one overt act, and proved to be guilty of another overt act of the same war, is it not in the eye of reason and law sufficient? So, though the overt act be charged at Blannerhassett's Island, and though he were not there, yet if we prove an overt act against him at the mouth of the Cumberland, will it not be sufficient? If he be indicted for one overt act of ten committed in Virginia, it will be sufficient. Though he is guilty of all the ten, there is no necessity of indicting him for all.

Mr. Wickham then read Deacon's case, for the purpose of proving that the prisoner must be actually present where the act of treason was perpetrated, or that an indictment against him as a principal in treason cannot be supported. After looking into the case, I do not think it

answers any such purpose. We may refer to this case to show that we may be permitted to prove other overt acts, after having given evidence of one overt act laid in the indictment, for the purpose of showing *quo animo* the act charged was committed.

Mr. Wickham says, that we must prove that the accused was personally present. No, sir; it is necessary to prove that some act laid has been committed. We may prove acts at the mouth of Cumberland, as tending directly to prove an act done at Blannerhassett's Island. It is true that we may be obliged to prove an act at Blannerhassett's Island, but because we are to prove an overt act there, are we obliged also to prove that he was there in his own proper person? If the law pronounce that he is liable for the acts of his agents, and if the fact be that his agents, by his commands and at his request, committed the act, where is the necessity of producing proof that he was on the spot himself? The constitution having declared that "treason against the United States shall only consist in levying war against them," &c., war may be considered as being levied by any man who levies it by means of his agents; and Aaron Burr may be considered as being present on Blannerhassett's Island, when his agents, at his request, and by his contrivance and persuasion, committed the act there.

The case of Wedderbourn, *Foster*, 22, supports the right to introduce other overt acts not laid, after proving one act laid; and though, in those two cases, the accused was present at the place where the overt act was done, it is no evidence, nor is it declared in either case, that he *must* be present in his own proper person, or that the prosecution cannot be maintained.

Mr. Wickham has also referred to the case of Lord Balmerino, reported in 9 *State Trials*, 587, to show that, not having been at the city of Carlisle, when it was taken, he could not be indicted as a principal in that treason. A more minute examination of this case satisfies me that it cannot be used as an authority for this purpose. The fact is, that he was indicted for levying war in the usual way, and though not present when the city was taken, he was there in a short time afterwards, and being there and found in possession of the place, he was considered

as if he had been there when the city was taken. He made an objection at first with respect to the day; that he was not there on the 10th November, the time laid in the indictment; but this objection was abandoned, it being agreed by all parties that the day is not material, if the fact happened and be charged before the time of preferring the indictment.

Chief Justice. — It was also observed in that case, that his not being there at the time of taking the city was immaterial; that his entry into and detainer of the place was a sufficient overt act, and the proof of any one overt act was sufficient, without any more; and other overt acts were proved on that prisoner.

Mr. Wickham's argument was stated to be this: that the case clearly showed, that it was necessary to prove that Lord Balmerino had been personally in the city of Carlisle; that he was present and an actor in the scene where the overt act was laid; and that if the counsel for the crown had understood the law to be otherwise, as the counsel for this prosecution do, they would have answered, "Whether the prisoner had been present at Carlisle or not was of no consequence; others with whom he was connected were there, and committed the act charged on him; and as all are principals in treason, their acts are his."

Mr. Mac Rae. — The materiality of the day was first contended for by Lord Balmerino, but soon relinquished. He principally insisted that he was not within the indictment, as he was not at Carlisle at the taking of it; but finding himself mistaken, he begged pardon of the court for having made the objection and given them so much trouble. There was no sort of doubt but two or three treasonable acts laid in the indictment were sufficient, and easily proved. Nor could the court have any doubt that a person leagued with another in a treasonable plot was equally guilty, though not actually present with that other person at the commission of an overt act. The obvious and natural construction is, that having been found in possession of the city and detaining it, he was considered as guilty of the overt act charged in the indictment, precisely as if he had been there when the city was taken. For the purpose of showing, that if the com-

mon law be not in force here, there can be in this country no such character as an accessory before the fact, in treason, Mr. Wickham has referred the court to the case in 10 *State Trials*, 436, where he says he understands this doctrine to be recognized, that where an act is made a crime by a statute, which was not so at common law, it is to be so construed, as that no person concerned in the perpetration of that crime may be dealt with as accessories at common law, unless the accessories be expressly mentioned. I consider the truth of this position as very unimportant in the case before the court. Probably if Mr. Wickham had looked again, he would not have found it to be so correct as he at first supposed. He has referred to the opinion of Hume Campbell, who was arguing before the court the case of Stephen McDaniel and others ; and however respectable a man Hume Campbell may be, as he has referred to no authorities in support of his opinion, it can only have an equal effect with the opinion of any other well-informed counsel. Not deeming the position very important as it refers to this case, I do not think it necessary to give any further reply to what was said on that subject, though Hale seems to say the contrary. Mr. Wickham says, that in this particular case, the acts of Congress are to govern, and that the common law is to have nothing to do with it. Sometimes we are told that the common law is to govern, for the purpose of restraining irregular acts within narrower limits, and it is resorted to also for the purpose of getting evidence in this prosecution ; but here it is said that the acts of Congress are to govern, and that this particular case is indeed proof of it. Though this is a mere assertion, unsupported by proof, we consider it immaterial. It only shows that they are willing to use or reject the common law, as may suit their purposes. But he asks if the accessory is to be punished, why has not Congress provided for his punishment ? We answer that the prisoner is a principal ; every person concerned in the plot is a principal. If all are to be regarded in treason as principals, it is not necessary for an act of Congress to pass, calling him by the new name of accessory. Let all who are in any manner concerned in treason be principals, and it will tend more than anything to prevent and sup-

press treason. Although it may be said that the interpretation of these words is directly opposite, I believe, sir, that a court of very high authority in this country will be found to sustain the opinion advanced by me (and not that supported by Mr. Wickham), that it would not be necessary or proper for Congress to legislate at all on this subject, that they have no right to do so, and that the silence of Congress is an evidence of their opinion. If they have a power to inflict punishment on those who are commonly called accessories before the fact, why have they not legislated on a subject so very important? They might punish their victims at their pleasure, if they had the power in question; and Mr. Wickham's interpretation, instead of preventing, would encourage, promote, and increase persecution and injustice. Let it be known that all are principals in treason, that every man in the least concerned in it is to be equally punished with the most guilty, and it will most effectually prevent treason. Who is more guilty than the man who enlists men, who builds boats, who contracts for the purchase of provisions? who more guilty than the man who held the purse and the sword? who more guilty than the man who seduced poor, ignorant, deluded men into that service? What must be the guilt of that man who is now lodged in jail, compared to that of the poor, ignorant man who was enlisted into his service, with some prospect of benefiting himself and family? What comparison is there between the poor man who went down the river with Colonel Tyler to better his situation and the intelligent but guilty man who projected this treason, and furnished and pointed out the means of effecting a separation of the Union? Will you take the lives of those misguided, deluded men who went with Blannerhassett from his island, unconcious of guilt, with the hopes of acquiring fortunes by honorable means, and give impunity to the man who contrived and matured this vile and detestable scheme of treason and disunion? Will you sanction a construction so unjust and injurious, so oppressive and cruel to innocence, so conducive to the impunity of vice and the multiplication of crimes?

Mr. Wickham says, that by this construction men may be punished unjustly, and become the victims to the caprice of the government. I hope it will be seen that

there is no danger of sacrificing victims to the unjust vengeance of the government in this country. This, the nature of the government and the liberality and humanity of the citizens in general would render highly improbable; but the safeguards provided by the constitution render it absolutely impossible. The constitution has excluded the possibility of such injustice, by requiring the trial of every person accused to be speedy, and by an impartial jury of the state and district in which the offence is charged to have been committed; by not subjecting him to punishment but by the evidence of two good men proving the same overt act; by forbidding his conviction except on the testimony of two good men concurring as to the same fact, and thereby putting its existence beyond all doubt. The framers of the constitution never did mean to put it in the power of the public functionaries or agents of the people to commit such abuse of power as the gentleman seems to apprehend. The mode of election and the salutary checks and provisions which that instrument contains render it perfectly visionary. They never intended that the chief magistrate or any other officer should arrogate to himself powers never delegated or intrusted by the people. They never intended to put it in the power of such men to trample the constitution under foot with impunity. Consider, that in this case there is no sort of comparison between the high guilt of the chief or superior, who directs every movement and principle of the conspiracy, and his subordinate agents, who obey his will and act under his orders; that all these agents are amenable to him, and he ought to be responsible to the government for their acts as well as his own.

Mr. Wickham argues on abstract principles, and affects to disclaim individual allusions; but notwithstanding his *abstract* mode of reasoning, he says some very strong things which seem not to be easily distinguishable from personal applications. For the sake of an abstract argument, he supposes that men should be in power who would be inclined to single out an unfortunate individual as a victim for the gratification of their revenge, and that when there was an insurrection in New Hampshire, with a view to make him a victim, they should drag from New

Hampshire to Georgia a man who never thought of treason, and manage to cause his conviction, by proving first the insurrection, and then by one witness only that he was connected with it. This is indeed an absurdity; to speak of the conviction of a man by one single witness, or of dragging a man a great distance from the place or district wherein he ought to be tried to another wherein he ought not; or of many other strange things as little to the purpose. The constitution forbids this interpretation, and we ought not to suppose that any member of the government will act in express violation of the constitution. But we may presume a different thing: that there is actually an insurrection within one of the districts of the Union; that that which the constitution forbids to be done, as a conviction by the evidence of a single witness, can be proved by a great many persons. Let me suppose a case *in the abstract:* we will suppose that there is a very excellent chief magistrate, who has faithfully served the people, and whom the people therefore elected to the highest office they could bestow upon him; that his views are every way correct and honorable; that he is as inimical to oppressions as friendly to the constitution and laws which he has sworn to support. We will suppose another man, whose ambitious views had led him to engage in malpractices and intrigues, whom his country had before elevated, but displaced because of those intrigues; that he had fallen very low, almost in dust and ashes; that he projected a plot of treason against his country. Can you imagine that the constitution or laws should contain any provision which would guard the rights of this fallen man against the views of this elevated character? Is it not merely sufficient to mention the case, to show that he is perfectly safe and has nothing to apprehend? This case is infinitely stronger, and goes to show that this is merely an imaginary danger; that it cannot exist in this country. The constitution is devised for the preservation of liberty, and must be so construed as to contain safeguards for itself. No innocent man who was ever accused has been convicted, for the constitution has completely excluded such evidence as would produce that effect in every case that can come before this court, or any other court in this country.

Our construction we think correct, because it is calculated to secure the rights of the citizen and to render the government permanent; whereas, if the construction of the gentlemen on the other side be correct, the government cannot be permanent. Let him have the power of ubiquity, the conspirators will always contrive to avail themselves of this plea, that they were not present. If their construction be correct, every person in this situation is to be regarded as an accessory, and because the constitution and law contain no provision concerning accessories, he is not to be punished. What is to be the consequence? That the man who is determined like him to subvert the government may contrive, plan, plot, and conspire the worst schemes of treason, and ruin and destroy every poor deluded man whom he can beguile, and he himself will be unpunished. But surely common sense will not sanction so monstrous a proposition. According to what we believe to be common sense, the head of the party, the contriver of the whole traitorous plot, is guilty of treason. I will read from *Foster*, 362, a passage which will show that if our construction be not such as common sense approves, it is at least such as superior courts have applauded. My worthy friend will not question that sentence. "If a man inciteth to the offence he is *quodam modo* guilty of the offence. In *foro cœli* this is true. In the sight of God, Ahab was the actual murderer of Naboth. Hast thou, saith God to him by the prophet, killed and also taken possession? In the place where dogs licked the blood of Naboth, shall dogs lick thy blood, even thine; and in the case of Uriah, God by another prophet saith to David, Thou hast killed Uriah the Hittite with the sword, with the sword of the children of Ammon hast thou killed him." David had placed Uriah in the front of the battle, in opposition to a very powerful opponent, in order that he might be slain, and that David might afterwards take his wife. He was slain, and David took his wife; and here David is said to have slain Uriah himself. I believe this to be of the highest authority, and cannot be controverted as to the good sound sense it contains, notwithstanding the subsequent passage. It goes a great way to prove that the construction we give to the law is better than that which the gentlemen on the

other side give. I believe that if the people were to be asked *who killed Uriah*, David or the antagonist by whose sword he fell? the answer of all would be, that having placed him in the front of the battle, in a place of the greatest danger, in immediate opposition to a man of great strength and power, with an intention that he should be killed, *David killed him;* that he was more guilty of murder than the mere agent by whose hands Uriah fell; and on the same principle, he who causeth another to be killed, by a third person, is more guilty of murder than the mere agent whom he employs to deprive him of life.

But I will admit, if the admission be of any service, that it seems that this distinction hath been taken between the acts of the accessory and principal. I will admit that some of the authorities will go a great way to show that before you proceed against the accessory you must proceed against the principal; and in such cases, one of the first steps to be taken must be the exhibition of the record. But I believe, sir, that there is a great difference between this case and cases of common felonies, which are those generally discussed in the books. In those cases you cannot proceed against the accessory before the conviction of the principal, unless he give his consent to it. It is said in *Foster*, that he who is guilty of an accessorial treason cannot be tried before the principal; but before they can use this as conclusive authority, they must show cases precisely similar to this, in which the accused was regarded not as a principal, but as an accessory. This, I am confident, they cannot do; but we will be able to show some cases precisely like this in principle, wherein the persons accused were regarded not as accessories, but, though not actually present, were regarded as present and principals in the felony. In *Foster's Crown Law*, 353, 354, this doctrine is fully explained. "Three soldiers went together to rob an orchard; two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by collared the man at the gate, and asked him what business he had there; and thereupon the soldier stabbed him. It was ruled by Holt to be murder in him, but that those on the tree were innocent. They came to commit a small

inconsiderable trespass, and the man was killed on a sudden affray without their knowledge. It would, said he, have been otherwise, if they had all come thither with a general resolution against all opposers.

"This circumstance, I think, would have shown that the murder was committed in prosecution of their original purpose; but *that* not appearing to have been the case, those on the tree were to be considered as mere trespassers. Their offence could not be connected with him who committed the murder.

"A general resolution against all opposers, whether such resolution appeareth upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behavior, at or before the scene of action. Such resolutions, so proved, have been also considered as strong ingredients in cases of this kind; and in cases of homicide, committed in consequence of them, *every person present, in the sense of the law, when the homicide hath been committed, hath been involved in the guilt of him who gave the mortal blow.*

"The case of Lord Dacre, mentioned by Hale, and of Pudsey, reported by Crompton, cited by Hale, turned upon this point. The offences they respectively stood charged with, as principals, were committed far out of their sight and hearing, and yet both were held to be present. It was sufficient that, at the instant the facts were committed, *they were of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those that did the facts.*" Other cases may be shown where the prisoners were decided to be present in the sense of the law, though the offences were committed a great way out of their sight and hearing; but it was deemed sufficient that they were of the same party, having the same object in view, and mutually bound to support one another. This doctrine fully applies to the case at bar, as we suppose the facts to have existed. We suppose the prisoner, by himself and agents, to have been acting at or about the same time at Beaver, Kentucky, and Blannerhassett's Island. We suppose that the prisoner enlisted men before he came to Beaver, and at it. We suppose that afterwards

his men proceeded by his orders to Blannerhassett's Island, and were there increasing their numbers by more enlistments, and providing the means of transporting his troops down the river towards the scene of his expedition, while he was himself enlisting more men in Kentucky, and making arrangements preparatory to his meeting and assuming the command of the whole at the mouth of Cumberland; and that, in fact, pursuant to this plan of operations, he did meet and take the command of all the conspirators at the latter place. We believe this statement to be substantially true. Does it not come within the doctrine just explained by this respectable author? Sir, was not the prisoner of the same party and upon the same pursuit with the rest? Was he not under the same engagement and expectation of mutual defence and support with those that did the facts at Blannerhassett's Island and at Cumberland? If he were *legally* present, he was a principal, and not an acces sory. These rules apply to cases of felony, and the gentlemen's doctrine is, that the same rules which apply to felony operate in treason. If the rules of felony be those of treason, I will show you by this authority that the presence of the prisoner was not necessary at Blannerhassett's Island. 1 *Hale's Pleas of the Crown*, 439. "Therefore it remains to be inquired, first, Who shall be said to be present? Second, Who shall be said to be abetting, aiding, or assisting to the felony?

"1. As to the first, if divers persons come to make an affray, &c., and are of the same party, and come into the same house, but are in several rooms of the same house, and one to be killed in one of the rooms, those that are of that party, and that came for that purpose, though in other rooms of the same house, shall be said to be present." *Dalt. cap.* 93, *p.* 241.

"The Lord Dacre, and divers others came to steal deer in the park of one Pelham; Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; it was ruled that it was murder in them all, and they died for it. *Cromp.* 25, *a. Dalt. ubi supra*, 34 *Hen. VIII. B. coron.* 172.

"The like in case of burglary, though some stood at

the land's end or field gate to watch if any came to disturb them (*Co. P. C.*, 64. 11 *H.* 4, 13, *b*), yet they are said to be burglars, because present, aiding and assisting to the burglary."

These cases may be well compared to the case at bar. The first case, for instance, of the house and several rooms, may be compared to the United States collectively, and the individual states separately. *Abstractedly*, the different states may be considered as so many rooms, belonging to the same house. *All* being one party, acting with one common view, and at the same time, and depending on mutual aid and support, though in different states, ought to be considered as present at the different scenes of operation, and responsible in equal degree for whatever is done in pursuance of their common design. In like manner the second case of stealing deer out of the park may also be justly likened to this case. Those who were in other parts of the same park, though not present where one party killed the keeper, were equally guilty with him in the eye of the law, because they were all of the same party, and in pursuit of the same design, and expecting mutual support and defence. The different states may be compared to different parts of the park; all, being of the same party, at the same time contributing to one common object (though in different states), and expecting mutual aid, ought to be held responsible for the acts of all, perpetrated in pursuance of their general design. The same comparison will hold between the case of burglary and this case. Though the prisoner may have been in Kentucky himself, acting towards the accomplishment of his great design, and part of his party were acting the parts assigned to them at Philadelphia, while others were equally active on Blannerhassett's Island, yet he and those with him were in law regarded as present at the commission of the overt act on the island, and of every other overt act committed anywhere. In *Foster*, 349, 350, this doctrine is further explained: "When the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a strict actual immediate presence, such presence as would make him an eye or ear witness of what passeth.

"Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it. For it was made a common cause with them; each man operated in his station, at one and the same instant, towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise." So here, the persons engaged in the conspiracy have different parts assigned to them. Some are at Beaver, some at Blannerhassett's Island, some in Kentucky, and some even as low as New Orleans; some actively employed, and others vigilantly attending to warn them of the approach of the *Philistines*. All are in the eye of the law present at every overt act which is committed. It was a common cause, to produce the same common end, and they were all performing their different parts at the same time.

If there had been an authority read to fit the case exactly, it could not be more strictly appropriate. Every material circumstance which relates to the character of this enterprise is here expressly recognized. I believe the present case is precisely similar to that which I have just read, and that it will be regarded as such by the court.

I am much indebted to the court for suggesting the mode of adverting to the evidence, and the impropriety of its determining the question, whether an overt act have been committed or not. It meets my most perfect approbation. There would be an evident impropriety in stating the evidence in any other form than that in which it has been done.

From 2 *Dallas's Reports*, 355, 356, I will show that a court of the United States, acting in a case of this sort, has decided that a man who is not actually present may be proceeded against as a principal in treason. In the case of the United States against Mitchel, the charge of the court was delivered to the jury in substance, by

Judge Patterson, thus: "The first question to be considered is, What was the general object of the insurrection? If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence in legal estimation is high treason. It is a usurpation of the authority of government; it is high treason by levying of war. Taking the testimony in a rational and connected point of view, this was the object; it was of a general nature and of national concern.

"Let us attend for a moment to the evidence. With what view was the attack made on General Neville's house? Was it to gratify a spirit of revenge against him as a private citizen? As an individual? No. As a private citizen, he had been highly respected and beloved; it was only by becoming a public officer that he became obnoxious; and it was on account of his holding the excise office, alone, that his house had been assailed and his person endangered. On the first day of attack the insurgents were repulsed, but they rallied, returned with greater force, and fatally succeeded in the second attempt. They were arrayed in a military manner. They affected the military forms of negotiation by a flag. They pretended no personal hostility to General Neville, but they insisted on the surrender of his commission. Can there be a doubt, then, that the object of the insurrection was of a general and public nature?

"The second question to be considered is, How far was the prisoner traitorously connected with the insurgents? It is proved by four witnesses that he was at Couch's Fort, at a great distance from his own home, and that he was armed. One witness proves positively that he was at the burning of General Neville's house; and another says that it runs in his head that he also saw the prisoner there. On this state of the facts, a difficulty has been suggested. It is said that no act of treason was committed at Couch's Fort, and that, however treasonable the proceedings at General Neville's may have been, there are not two witnesses who prove that the prisoner was there. Of the overt act of treason there must undoubtedly be proof by two witnesses; and it is equally clear that the intention and the act, the will and the deed, must

concur ; for a bare conspiracy is not treason. But let us consider the prisoner's conduct, in a regular and connected course ; he is proved by a competent number of witnesses to have been at Couch's Fort. At Couch's Fort the conspiracy was formed for attacking General Neville's house, and the prisoner was actually passed on the march thither. Now, in *Foster*, 213, the very act of marching is considered as carrying the traitorous intention into effect, and the jury (who will sometimes find the most positive testimony contradicted by circumstances which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at General Neville's house.

"On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary ; he was armed, he was a volunteer, he was a party to the various consultations of the insurgents ; and in every scene of the insurrection, from the assembly at Couch's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's Field, would of itself amount to treason, if his design was treasonable.

"Upon the whole, whether the conspiracy at Couch's Fort may of itself be deemed treason, or the conspiracy there and the proceedings at General Neville's house are considered as one act (which is perhaps the true light to view the subject in), the prisoner must be pronounced guilty ; the consequences are not to weigh with the jury ; it is their province to do justice ; the attribute of mercy is placed by our constitution in other hands."

Now, here is a case not by any means half as strong as the case before the court. The treason was only proved by one witness, and the only regular proof was, that the party accused was at Couch's Fort. He was present, it is true, at the various consultations of the insurgents, but there was no constitutional proof that he was at General Neville's house, the only place where a complete overt act of treason was committed ; he was only seen marching (as proved by the second witness) towards the place, yet he was proceeded against as a principal in the treason, and found guilty. Here the prisoner was not

only the prime mover and contriver of the whole plot at Blannerhassett's Island and elsewhere, but he went from the island to Kentucky, and from thence to the mouth of Cumberland, the place of their general meeting, and there assumed the command, as he had before planned and directed all their operations.

The gentlemen have said, that the opinion of the Supreme Court, in the case of Bollman and Swartwout, relied on by the counsel for the prosecution, is to be considered not as a regular, solemn opinion, delivered on a point depending before the judges, but as extrajudicial, and therefore not authority. I have read the opinion in Bollman and Swartwout, and it does appear to me that all parts of it, which relate to what constitutes treason, are completely judicial.

I was not present to hear the opinion, nor is it material that I should have been; it is enough that I have read the opinion itself; it shows that this was the point on which the court delivered a deliberate opinion; it is the point on which the opinion turns. But I do not refer to it for the purpose of showing what treason is, but to show that a man need not be present in order to be considered as a principal in treason. The language of the opinion is so explicit and pointed, that it cannot possibly, in my estimation, be misunderstood. "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if *a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.*" Now, sir, this is the very case which the opinion supposes. He is not only supposed to be leagued, but the prime mover of the general conspiracy; a body of men have assembled to effect by force their treasonable design, and the *prisoner has performed many parts*, though not present at Blannerhassett's Island. He is supposed to have formed this deep-laid plan of treason for his own personal aggrandizement and elevation. There is no doubt, then, with respect to the ground which

the prisoner ought to occupy. The remoteness of the place where he was when the acts on the island were committed cannot, according to this solemn and deliberate determination of the highest tribunal of our country, diminish his guilt; and this opinion is often repeated in that judicial sentence.

I shall content myself with what has been already said, to show, that whether this question is to be considered as it relates to the constitution of the United States or the laws of England, the form of either count of the indictment is proper. I shall not argue that point, because in all my argument I have believed, and therefore insisted, that the prisoner is not be regarded as an accessory, but as a principal, both according to a rational construction of the constitution and the common law; nor will it be necessary for me to say anything with respect to the mode of proceeding against the accessory; because I presume the decision will be, that he is to be considered as a principal.

But, perhaps, it will be necessary for me to notice a few remarks made by Mr. Wickham and Mr. Randolph. Mr. Wickham fancied that he had discovered an important defect in the indictment, because it does not state that the accused levied *public* war. This objection, surely, is entitled to no consideration. The indictment describes the offence in the language of the constitution, that he *levied war* against the United States. The constitution does not contain such an expression as *public* war; it speaks only *of levying war*, which of itself implies without any epithet that it is *public*, and from the nature of things cannot be private.

Besides, the precedents do not uniformly charge the party accused with levying a *public* war. In 5 *State Trials*, the indictment against Vaughan does not state that he levied a public war. *Foster*, 208, 218, states that though in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner, and, where the case will admit of it, the circumstances of swords, guns, &c., have been added, yet the merits of the case never turned singly on any of those circumstances. In the cases of Damaree and Purchase, which were for the constructive levying of war,

there was nothing given in evidence of the usual pageantry of war, no military weapons; and yet the want of those circumstances weighed nothing with the court, though much insisted on by the prisoner's counsel. In page 218, he states that listing and marching are sufficient overt acts, without coming to a battle. These doctrines are confirmed in *East's Crown Law*, 67, 68. From these it may be inferred, that though it may be usual to insert the word *public*, because war must from its nature be public, yet it is unnecessary to use it; for if it be unnecessary in any indictments for constructive treason, to prove the usual pageantry of war (as weapons, banners, drums, &c.), and if the want of those circumstances weigh nothing with the court, it surely is not essential to charge in the indictment what need not be proved; and if these be unnecessary to be stated, it must be equally so to state that a public war was levied. I refer the court, for a further confirmation of this doctrine, to 5 *Bac.* 121; and in the second indictment against John Fries, the word *public* is omitted, though it was inserted in the first. As Mr. Wickham cited some cases to show that the names of the accomplices in connection with whom the treason has been committed are to be inserted, and objects to its being stated that they are *unknown*, I will adduce several other cases, entitled to equal credit, where the names of the accomplices were not in the indictment. In 6 *State Trials*, 60, the indictment against Francis Francia charges that he conspired and agreed with divers *persons, to the jurors unknown*, to commit the treason therein specified.

In the indictment against Christopher Layer, 6 *State Trials*, 229, he is charged with compassing the death of the king, and that "he did, with divers false traitors to the *jurors unknown*, traitorously, &c., conspire, &c., to raise, levy, and move rebellion and war against the king."

The indictment against Elizabeth Gaunt, 4 *State Trials*, 142, in like manner charges that she conspired the death of the king, with divers false traitors and rebels to the *jurors unknown*.

The name of the accomplice is also omitted in the indictment against Thomas Rosewell, in 3 *State Trials*, 997.

In the same manner the indictment against John Hampden states, 4 *State Trials*, 207, that he conspired the death of the king with divers *other false traitors unknown;* and in the same volume, page 131, both John Fearnby and Henry Cornish are each of them indicted for conspiring and compassing the king's death, with divers false traitors and rebels unknown to the jury, though the former is charged with harboring James Bunton, a traitor, and the latter with harboring Joseph Halloway and Henry Lawrence, traitors; and in the indictment against John Fries, he is charged to have committed the offence with a great multitude of persons, whose names are unknown to the jury.

The gentlemen have referred the court to a great number of authorities, for the purpose of showing what treason is. I shall not deem it necessary to go through an examination of all their authorities, defining the crime. I shall content myself with believing that it is impossible to give the court any information respecting the essential definition of this offence, which it does not already possess; but I will observe that the authorities I have just referred to from the *State Trials*, *Foster*, *Bacon*, and *East*, to show that it is not necessary to charge the war to be a *public* war, or improper to state that the crime was committed in connection with persons unknown, also will go to prove that an overt act of treason may be committed without actual force. I consider it as completely proved by the opinion in the case of Bollman and Swartwout, that if an unlawful assemblage of men meet together for a treasonable purpose, it is not necessary that arms should be in the hands of those who are concerned, in order to make them traitors. I have imagined that their meeting together in this manner (in militaty array) would be sufficient to show that their purpose was treasonable. I have supposed that assembling men for a treasonable purpose would constitute an act of treason. I consider the reasoning of East as conclusive on this subject, where, among other things, he says, "that any assembly of persons met for a treasonable purpose, armed and arrayed in a warlike manner, is *bellum levatum*, though not *percussum*." "Enlisting and marching are sufficient overt acts, without coming to an actual engagement,"

and "that numbers will often supply the want of military weapons and discipline, as experience has often evinced." The opinion of Judge Chase, in his charge to the jury on the trial of Fries, page 197, is nearly to the same effect. (*Vide ante.*) I do not believe that the Supreme Court, if it had formed deliberately the opinion which it gave in Bollman and Swartwout, as the only true and proper definition of the crime, now charged and proved before it, would have given a definition varying from it, as that opinion is so extremely apposite to the case now before the court. "The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage." Is not this the very case which is before the court? It is not the equivocal act of individuals travelling singly to the place of rendezvous. Have not these men gone from Blannerhassett's Island, the place of their partial, to the mouth of Cumberland, the place of their general, rendezvous? Did not another body of men meet at the latter place those who went from the island? This definition comes most completely up to this case. There are particular bodies of men, different places of partial rendezvous, and a general place of rendezvous; and they march from the former to the latter. A reference to the evidence will prove this to be most indisputably true. There was unquestionably an assemblage on the island, which afterwards formed a part of the general meeting at the mouth of Cumberland. Though it is my opinion, that it is not necessary to prove that these men were armed, yet it is not transcending the evidence in the cause to say that they were armed. Several witnesses prove they had a considerable number of arms with them, and that they used those arms. One person said that there were arms enough for all those who were on the island; and several persons proved that they were prepared to defend themselves. When this evidence is connected with the proof of their having boxes of arms afterwards, without anything to show that they received those arms after leaving the island, the presumption is

strong and violent that all on the island were armed. I ask, What character do these things give to these transactions? Are they not sufficient to constitute a military appearance or warlike posture? the *speciem belli?* As their intentions were traitorous, were they not guilty of treason according to the opinion of the Supreme Court?

I should suppose that as we have proved, or, to speak more correctly, were prepared fully to prove, to the satisfaction of the jury, that the overt act laid in the indictment has been committed, we have a right to adduce, in confirmation or corroboration thereof, and to show the intention of the party committing it, proof of other overt acts not laid in the indictment. This has been fully established by authorities. In addition to Deacon's case and other cases from Foster, from State Trials and other authors which have been heretofore read to the court, I refer to 1 *Dallas's Rep.* 35, where it was ruled by the court, in the case of the Commonwealth *v.* Mulin, "that evidence might be given of an overt act, committed in another county, after an overt act was proved to have been committed in the county where the indictment was laid and tried."

This is the evidence by which Mr. Wickham fears we can abundantly prove the guilt of his client, and hence his anxiety, hence the greatest exertions of his eloquence and talents, to exclude this testimony.

If gentlemen contend that sufficient proof of the overt act has not yet been produced, and that therefore we have no right to introduce corroborative evidence, and that the court ought to judge whether the overt act be proved, I am sure this court will not undertake to decide whether the evidence amount to a proof of the overt act, and to decide on the weight of evidence, and thereby usurp the rights which belong exclusively to the jury.

There is so evident an impropriety in the court deciding on the competency of the evidence to establish an overt act, that I should suppose it would be barely sufficient to mention it to be convinced of it. But though I think the point so clear, and though I have already detained the court too long, I hope to be excused for introducing one or two authorities, which seem to be conclusive, if, indeed, any authority be necessary in so plain

a case. I will read a few sentences from *East's Crown Law*, 66, 67, to show that this is a question proper for the jury alone to decide, and that it is a question of fact which cannot regularly be taken from them : " It must in general be difficult, in the inception of intestine troubles, to fix the period when opposition to the established government shall be said to wear the formidable appearance of insurrection, and to constitute what, in the terms of the act, is called a levying war against the king.

" It is *strictly*, therefore, a *question of fact, to be tried by the jury, under all the circumstances ;* " and in support of his opinion, he refers to Hale, Foster, the State Trials, and Salkeld.

This doctrine is also supported by the opinion of Judge Iredell, in *Fries's trial*, 175 : "*It is not for the court to say whether there was a treasonable intention or act, as charged in the indictment ;* that is for the jury to determine : we have only to state the laws ; we therefore should have no right to give our opinion upon it." "A jury must give a verdict upon all the evidence collectively ; if the evidence is admitted, then the *jury is bound to respect the weight of it ;* the competency of that evidence is for the court to decide, but the jury must *estimate its weight*."

These authorities appear to me to establish this point conclusively ; if anything be necessary to be superadded, I refer to the opinion of the court, heretofore declared, as I understood it : that "the levying of war is a *fact*" which must be decided by a jury. If it be a question compounded of fact and law, it ought also to be decided by the jury.

According to the laws of England, if they are to be considered as in force in this country, according to the common law, if the common law have any force here, or according to the constitution of the United States, this indictment has been properly preferred against the prisoner. I trust that enough has been said to show that we have disproved the two points, attempted to be established by the counsel for the prosecution ; and that the overt act committed on Blannerhassett's Island will justify you in permitting us to bring forward all the rest of our evidence.

TUESDAY, AUGUST 25, 1807.

Mr. Wirt addressed the court:—

It is my duty to proceed, on the part of the United States, in opposing this motion. But I should not deem it my duty to oppose it, if it were founded on correct principles. I stand here with the same independence of action which belongs to the attorney of the United States; and as he would certainly relinquish the prosecution the moment he became convinced of its injustice, so also most certainly would I. The humanity and justice of this nation would revolt at the idea of a prosecution pushed on against a life which stood protected by the laws; but whether they would or not, I would not plant a thorn, to rankle for life in my heart, by opening my lips in support of a prosecution which I felt and believed to be unjust. But believing, as I do, that this motion is not founded in justice, that it is a mere manœuvre to obstruct the inquiry, to turn it from the proper course, to wrest the trial of the facts from the proper tribunal, the jury, and embarrass the court with a responsibility which it ought not to feel, I hold it my duty to proceed for the sake of the court, for the sake of vindicating the trial by jury, now sought to be violated, for the sake of full and ample justice in this particular case, for the sake of the future peace, union, and independence of these states, I feel it my bounden duty to proceed; in doing which, I beg that the prisoner and his counsel will recollect the extreme difficulty of clothing my argument in terms which may be congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreasonable degree of sensibility on this occasion. They seem to forget the nature of the charge, and that we are the prosecutors. We do not stand here to pronounce a panegyric on the prisoner, but to urge on him the crime of treason against his country. When we speak of treason, we must call it treason. When we speak of a traitor, we must call him a traitor. When we speak of a plot to dismember the Union, to undermine the liberties of a great portion of the people of this country, and subject them to a usurper and a despot, we are obliged to use the terms which con-

vey those ideas. Why, then, are gentlemen so sensitive? Why on these occasions, so necessary, so unavoidable, do they shrink back with so much agony of nerve, as if, instead of a hall of justice, we were in a drawing-room with Colonel Burr, and were barbarously violating towards him every principle of decorum and humanity?

Mr. Wickham has indeed invited us to consider the subject abstractedly; and we have been told, that it is expected to be so considered; but, sir, if this were practicable, would there be no danger in it? Would there be no danger, while we were mooting points, pursuing ingenious hypotheses, chasing elementary principles over the wide-extended plains and Alpine heights of abstracted law, that we should lose sight of the great question before the court? This may suit the purposes of the counsel for the prisoner; but it does not therefore necessarily suit the purposes of truth and justice. It will be proper, when we have derived a principle from law or argument, that we should bring it to the case before the court, in order to test its application and its practical truth. In doing which, we are driven into the nature of the case, and must speak of it as we find it. But besides, the gentlemen have themselves rendered this totally abstracted argument completely impossible, for one of their positions is, that there is no overt act proven at all. Now, that an overt act consists of fact and intention has been so often repeated here, that it has a fair title to Justice Vaughan's epithet of a "*decantatum.*" In speaking, then, of this overt act, we are compelled to inquire, not merely into the fact of the assemblage, but the intention of it, in doing which, we must examine and develop the whole project of the prisoner. It is obvious, therefore, that an abstract examination of this point cannot be made; and since the gentlemen drive us into the examination, they cannot complain, if, without any softening of lights or deepening of shades, we exhibit the picture in its true and natural state.

This motion is a bold and original stroke in the noble science of defence. It marks the genius and hand of a master. For it gives to the prisoner every possible advantage, while it gives him the full benefit of his legal defence; the sole defence which he would be able to make

to the jury, if the evidence were all introduced before them. It cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of the assemblage, and to stamp beyond controversy the character of treason upon it. Connect this motion with that which was made the other day to compel us to begin with the proof of the overt act, in which from their zeal gentlemen were equally sanguine, and observe what would have been the effect of success in both motions. We should have been reduced to the single fact, the individual fact, of the assemblage on the island, without any of the evidence which explains the intention and object of that assemblage. Thus gentlemen would have cut off all the evidence, which carries up the plot almost to its conception, which at all events describes the first motion which quickened it into life, and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation. Thus of the *world* of evidence which we have, we should have been reduced to the *speck*, the *atom*, which relates to Blannerhassett's Island. General Eaton's deposition (hitherto so much and so justly revered as to its subject) standing by itself would have been without the powerful fortification derived from the corroborative evidence of Commodore Truxtun, and the still stronger and most extraordinary coincidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit, as they have heretofore done; not declaring that what General Eaton had sworn, was not the truth, but that it *was a most marvellous story! a most wonderful tale!* and thus would they have continued to seek, in the bold and wild extravagance of the project itself, an argument against its existence and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt. But I ask what inference is to be drawn from these repeated attempts to stifle the prosecution and smother the evidence? If the views of the prisoner were, as they have been so often represented by one of his counsel, *highly honorable to himself* and *glorious to his country*, why not permit the evidence to disclose these views? Accused as

he is of high treason, he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in showing us by evidence all this honor and this glory which his scheme contained. No, sir, it is not squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is alarm; it is fear; or rather it is the *certainty* that the evidence, whenever it shall come forward, will fix the charge; and if such shall appear to the court to be the motive of this motion, your Honors, I well know, will not be disposed to sacrifice public justice, committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no farther than the rigor of legal rules shall imperiously constrain you.

I shall proceed now to examine the merits of the motion itself, and to answer the argument of the gentleman (Mr. Wickham) who opened it. I will treat that gentleman with candor. If I misrepresent him, it will not be intentionally. I will not follow the example which he has set me on a very recent occasion. I will not complain of flowers and graces where none exist. I will not, like him, in reply to an argument as naked as a sleeping Venus, but certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce and then that furbelow, before I can reach the wished-for point of attack. I keep no flounces or furbelows ready manufactured and hung up for use in the millinery of my fancy, and if I did, I think I should not be so discreetly impatient to get rid of my wares as to put them off on improper occasions. I cannot promise to interest you by any classical and elegant allusions to the pure pages of Tristram Shandy. I cannot give you a squib or a rocket in every period. For my own part, I have always thought these flashes of wit (if they deserve that name), I have always thought these meteors of the brain which spring up with such exuberant abundance in the speeches of that gentleman, which play on each side of the path of reason, or, sporting across it with fantastic motion, decoy the mind from the true point in debate, no better evidence of the soundness of the argument with which they are connected,

nor, give me leave to add, the vigor of the brain from which they spring, than those vapors which start from our marshes, and blaze with a momentary combustion, and which, floating on the undulations of the atmosphere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed. I will endeavor to meet the gentleman's propositions in their full force, and to answer them fairly. I will not, as I am advancing towards them with my mind's eye, measure the height, breadth, and power of the proposition ; if I find it beyond my strength, halve it ; if still beyond my strength, quarter it ; if still necessary, subdivide it into eighths ; and when by this process I have reduced it to the proper standard, take one of these sections and toss it with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion as the proposition itself which I am going to encounter. I will not, in commenting on the gentleman's authorities, thank the gentleman with sarcastic politeness for introducing them, declare that they conclude directly against him, read just so much of the authority as serves the purpose of that declaration, omitting that which contains the true point of the case which makes against me ; nor, if forced by a direct call to read that part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air and exclaim, "Just as I said," when I know it is just as I had not said. I know that, by adopting these arts, I might raise a laugh at the gentleman's expense ; but I should be very little pleased with myself if I were capable of enjoying a laugh procured by such means. I know, too, that by adopting such arts, there will always be those standing around us who have not comprehended the whole merits of the legal discussion, with whom I might shake the character of the gentleman's science and judgment as a lawyer. I hope I shall never be capable of such a wish ; and I had hoped that the gentleman himself felt so strongly that proud, that high, aspiring, and ennobling magnanimity, which I had been told conscious talents rarely fail to inspire, that he

would have disdained a poor and fleeting triumph gained by means like these.

I proceed now to answer the several points of his argument, so far as they could be collected from the general course of his speech. I say, so far as they could be collected; for the gentleman, although requested before he began, refused to reduce his motion to writing. It suited better his partisan style of warfare to be perfectly at large; to change his ground as often as he pleased; on the plains of Monmouth to-day, at the Eutaw Springs to-morrow. He will not censure me, therefore, if I have not been correct in gathering his points from a desultory discourse of four or five hours' length, as it would not have been wonderful if I had misunderstood him. I trust therefore that I have been correct; it was my intention to be so; for I can neither see pleasure nor interest in *misrepresenting* any gentleman; and I now beg the court and the gentleman, if he will vouchsafe it, to set me right if I have misconceived him.

I understand him, then, sir, to resist the introduction of further evidence under this indictment, by making four propositions: —

1. Because Aaron Burr, not being on the island at the time of the assemblage, cannot be a principal in the treason, according to the constitutional definition or the laws of England.

2. Because the indictment must be proved as laid; and as the indictment charges the prisoner with levying war with an assemblage on the island, no evidence to charge him with that act by relation is relevant to this indictment.

3. Because, if he be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no parol evidence can be let in to charge him, until we shall show a record of the conviction of the principals in the first degree.

4. Because no evidence is relevant to connect the prisoner with others, and thus to make him a traitor by relation, until we shall previously show an act of treason in these others; and the assemblage on the island was not an act of treason.

I beg leave to take up these propositions in succession, and to give them those answers which to my mind are satisfactory. Let us examine the first: it is because Aaron Burr, not being present on the island at the time of the assemblage, cannot be a principal in the treason, within the constitutional definition or the laws of England.

In many of the gentleman's general propositions, I perfectly accord with him; as that the constitution was intended to guard against the calamities to which *Montesquieu* refers, when he speaks of the victims of treason; that the constitution intended to guard against arbitrary and constructive treasons; that the principles of sound reason and liberty require their exclusion; and that the constitution is to be interpreted by the rules of reason and moral right. I fear, however, that I shall find it difficult to accommodate both the gentlemen who have spoken in support of the motion, and to reconcile some of the positions of Mr. Randolph to the rules of Mr. Wickham; for while the one tells us to interpret the constitution by sound reason, the other exclaims, "Save us from the deductions of common sense." What rule, then, shall I adopt? A kind of reason which is not common sense might indeed please both the gentlemen; but as that is a species of reason of which I have no very distinct conception, I hope the gentlemen will excuse me for not employing it. Let us return to Mr. Wickham.

Having read to us the constitutional definition of treason, and given us the rule by which it was to be interpreted, it was natural to expect that he would have proceeded directly to apply that rule to the definition, and give us the result. But while we were expecting this, even while we have our eyes on the gentleman, he vanishes like a spirit from American ground, and we see him no more until we see him in England, resurging by a kind of intellectual magic in the middle of the sixteenth century, complaining most dolefully of my Lord Coke's bowels. Before we follow him in this excursion, it may be well to inquire what it was that induced him to leave the regular track of his argument. I will tell you what it was. It was, sir, the decision of the Supreme Court in the case of Bollman and Swartwout. It was the judicial

exposition of the constitution by the highest court in the nation, upon the very point which the gentleman was considering, which made him take this flight to England; because it stared him in the face and contradicted his position. Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry, in which he was, led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the Supreme Court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it under the action of his genius appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point which he was laboring. Hence it was that the decision was kept so sedulously out of view, until from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth, and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the Supreme Court of the United States. The inquiry is, whether *presence* at the overt act be necessary to make a man a traitor? The gentlemen say, *that it is necessary;* that he cannot be a principal in the treason without *actual presence.* What says the Supreme Court in the case of Bollman and Swartwout? "It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country; on the contrary, if war be actually levied, — that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, — all those who perform any part, however minute, *or however remote from the scene of action,* and who are

actually leagued in the general conspiracy, are to be considered as traitors."

Here, then, we find the court so far from requiring presence, that it expressly declares, that however remote the accused may have been from the scene of the treasonable assemblage, he is still involved in the guilt of that assemblage; his being leagued in the general conspiracy was sufficient to make the act his own. The Supreme Court, being of that opinion, proceeded to an elaborate examination of the evidence, to ascertain whether there had been a treasonable assemblage. It looked to the depositions of General Eaton and General Wilkinson, the ciphered letter, the declaration of Swartwout that Burr was levying an armed body of seven thousand men; and it looked to these parts of the evidence expressly for the purpose of discovering whether it were probable that Burr had actually brought these men together; not whether Bollman and Swartwout were present at any such assemblage. It knew that if any such assemblage had taken place, Bollman and Swartwout must have been, at that time, at the city of Orleans, or on their way thither; indeed, the whole reasoning of the court proceeded on the fact, as admitted, of the prisoner's absence. Why, then, the laborious investigation which the court makes as to the probability of Burr having brought his men, or any part of them, together, unless the guilt of that assemblage were to be imputed to Bollman and Swartwout? If their absence were sufficient to excuse them, that fact was admitted, and the inquiry would have been a very short one. But the court having previously decided that the fact of presence or absence was unimportant, that it made no odds how far distant the accused might be from the treasonable assemblage, it became the unavoidable duty of the court to proceed to the inquiry, whether any such assemblage had taken place; and if the evidence had manifested that fact to its satisfaction, it is clear that, in the opinion of that court, the prisoners would have been as deeply involved in the guilt of that assemblage, as any of those who actually composed it.

The counsel knew that their first point was met directly by the counter authority of the Supreme Court. They have impliedly, if not expressly, admitted it; hence they

have been reduced to the necessity of taking the bold and difficult ground, that the passage which I have read is extrajudicial, a mere *obiter dictum.* They have *said* this, but they have not attempted to *show* it.

Give me leave to show that they are mistaken ; that it is not an *obiter dictum ;* that *it is not extrajudicial ;* but that it is a direct adjudication of a point immediately before the court. What were the questions before the court ? The court made no formal division of this subject, but these questions are necessarily and irresistibly involved in it. It must first be observed that the arrest of Bollman and Swartwout at New Orleans, and the fact that they had not been present at any assemblage of the traitors in arms, were notorious and admitted. The case, then, presented to the court three distinct questions. 1. Has Aaron Burr committed treason, or has he been engaged or leagued in any treasonable conspiracy ? 2. Were Bollman and Swartwout connected with him ? 3. Could they be guilty of treason without being actually present ? Now, if the court had been satisfied that there had been an overt act, and that these men were leagued in the conspiracy which produced it, still it would have remained a distinct and substantive question, whether their absence from the overt act, and their having no immediate hand in it, did not discharge them from the constitutional guilt of levying war ; for though leagued in the conspiracy, and although there might have been an overt act, these men would have been innocent if presence at the overt act were necessary to make them guilty. The question, then, of presence or absence was a question really presented by the case of Bollman and Swartwout. It was one important to the decision of the case, and the court, thinking it so, did consider and decide it in direct opposition to the principle contended for on the other side. A plain man would imagine that, when the Supreme Court had taken up and decided the case, its decision would form a precedent on the subject, and having that authority on my side, I should suppose that I might safely dismiss the gentleman's first point. But Mr. Randolph seems to think it very doubtful whether you ought to be bound by that authority, and that you must be very much embarrassed to have to decide it,

even admitting it to be a regular judicial determination of this question ; for he made a very pathetic and affecting apostrophe to the situation in which you would be placed if you differed from this opinion of the Supreme Court.

I see no difficulty in the case, if our laws are to be uniform. How can the inferior court control the decisions of the superior court? You are but a branch of the Supreme Court. If you, sir, sitting as a Circuit Court, have a right to disregard the rule decided by the Supreme Court, and adopt a different rule, every other inferior court has an equal right to do the same ; so that there will be as many various rules as to treason as there are courts ; and the result might be, and certainly would be, that what would be treason in one circuit would not be treason in another ; and a man might be hung in Pennsylvania for an act against the United States, in which he would be held perfectly innocent in Virginia. Thus treason against the United States would still be unsettled and fluctuating, and the object of the constitution in defining it would be disappointed and defeated ; whereas a principle of law, solemnly adjudged by the Supreme Court, becomes, I apprehend, the law of the land ; and all the inferior courts are compulsorily bound by it. To say that they are not, is to disorganize the whole judiciary system, to confound the distinctions and grades of the courts, to banish all certainty and stability from the law, and to destroy all uniformity of decision. I trust that we are not prepared to rush into this wild disorder and confusion, but that we shall temperately and regularly conform to the decrees of that parent court, of which this is a mere branch, until those decrees shall be changed by the same high authority which created them.

But for a moment let us relinquish that decision, and putting it aside, let us indulge the gentleman with the inquiry, whether that decision be in conformity with the constitution of the United States and the laws of England. In interpreting the constitution let us apply to it the gentleman's own principles — the rules of reason and moral right. The question to be thus determined is, whether a man who is absent may not be guilty as if he were actually present.

That a law should be so construed as to advance the remedy and repress the mischief, is not more a rule of common law than a principle of reason; it applies to penal as well as to remedial laws. So also the maxim of the common law, that a law, as well as a covenant, should be so construed that its object may rather prevail than perish, is one of the plainest dictates of common sense. Apply these principles to the constitution. Gentlemen have said, that its object was to prevent the people from being harassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime, and provide for its punishment. The liberties of the people, which required that the offence should be defined, circumscribed, and limited, required also that it should be certainly and adequately punished. The framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this republic might one day or other be seized by the daring ambition of some domestic usurper, have given peculiar importance and solemnity to the crime, by ingrafting it upon the constitution. But they have done this in vain if the construction contended for on the other side is to prevail. If it require actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avoid this guilt and escape punishment forever? He may go into distant states, from one state to another. He may secretly wander, like a demon of darkness, from one end of the continent to the other.

He may enter into the confidence of the simple and unsuspecting. He may pour his poison into the minds of those who were before innocent. He may seduce them into a love of his person, offer them advantages, pretend that his measures are honorable and beneficial, connect them in his plot, and attach them to his glory. He may prepare the whole mechanism of the stupendous and destructive engine, and put it in motion. Let the rest be done by his agents. He may then go a hundred miles from the scene of action. Let him keep himself only from the scene of the assemblage and the immediate spot of

battle, and he is innocent in law, while those whom he has deluded are to suffer the death of traitors! Who is the most guilty of this treason, the poor, weak, deluded instruments, or the artful and ambitious man who corrupted and misled them? There is no comparison between his guilt and theirs; and yet you secure impunity to him, while they are to suffer death! Is this according to the rules of reason? Is this moral right? Is this a mean of preventing treason? Or, rather, is it not in truth a direct invitation to it? Sir, it is obvious, that neither reason nor moral rights require actual presence at the overt act to constitute the crime of treason. Put this case to any common man, whether the absence of a corruptor should exempt him from punishment for the crime which he has excited his deluded agents to commit, and he will instantly tell you, that he deserves infinitely more severe punishment than his misguided instruments. There is a moral sense, much more unerring in questions of this sort than the frigid deductions of jurists or philosophers; and no man of a sound mind and heart can doubt for a moment between the comparative guilt of Aaron Burr (the prime mover of the whole mischief) and of the poor men on Blannerhassett's Island, who called themselves Burr's men. In the case of murder, who is the most guilty, the ignorant, deluded perpetrator, or the abominable instigator? The decision of the Supreme Court, sir, is so far from being impracticable on the ground of reason and moral right, that it is supported by their most obvious and palpable dictates. Give to the constitution the construction contended for on the other side, and you might as well expunge the crime from your criminal code; nay, you had better do it, for by this construction you hold out the lure of impunity to the most dangerous men in the community, men of ambition and talents, while you loose the vengeance of the law on the comparatively innocent. If treason ought to be repressed, I ask you, who is the most dangerous and the most likely to commit it? The mere instrument who applies the force, or the daring, aspiring, elevated genius who devises the whole plot, but acts behind the scenes?

Permit me now to bring Mr. Wickham to England.

Sir, the decision of the Supreme Court is equally supported by the law of England. I understand him as saying, that no man can be guilty of treason, as a principal, who is not guilty of the overt act. Permit me to examine the 3d *Institute*, p. 9. Lord Coke, commenting on those words of the statute of Edward which make our constitutional definition of treason, says, "If *many* conspire to levy war, and *some* of them do levy the same, according to the conspiracy, this is high treason in *all*, for in treason *all are principals*, and war is levied."

In page 16, he says, "that although the statute of *Mary*, which made counterfeiting the privy signet or sign manual, high treason, says nothing of aiders or consenters, yet they are within the purview of the statute, for there be no accessories in high treason." So also in page 21, he says, "In high treason *there are no accessories*, but *all are principals;* and therefore, whatever act or consent will make a man accessory to a felony before the act done, will make a principal in high treason." So also in page 138, he says, that "it is a sure rule in law, that in *alta proditione nullus potest esse accessorius, sed principalis solummodo*," and in illustration of the rule, he puts this case: "If any man commit high treason, and thereby becometh a traitor, if any other man, knowing him to be a traitor, doth receive, comfort, and aid him, he is guilty of treason, for that there be no accessory in treason."

The gentlemen, indeed, admit that, according to Coke's authority, their client, though absent, might be a principal in the act of treason. But Coke, they say, had no bowels; that he was hard-hearted, unrelenting, cruel, and bloodthirsty; that his cruelty was so great, that it misled his understanding; that on criminal law he is not to be respected. Coke, however, does not state the positions which I have read on his own authority; on the contrary, he cites in the margin the authorities on which he bottoms them; and most ancient and respectable authorities they are.

But to gratify them, let us put Coke aside. What will they say to Lord Hale? Did any angry and savage passions agitate his bosom or darken the horizon of his understanding on criminal law? O, no, sir; no spot ever

soiled the holy ermine of his office; mild, patient, benevolent, halcyon peace in his breast, with a mind beaming the effulgence of noonday, and with a seraph's soul, he sat on the bench like a descended god! Yet that judge has laid down the doctrine for which I contend, in terms as distinct and emphatic as those of Lord Coke. In 1 *Hale*, 214, "But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally, within this statute, for in such case in treason all are principals." The same doctrine is in effect laid down in pages 323, 328, 339. In the first of which (page 323), it is stated in addition to the other doctrine, that "regularly in a new treason, the aiding and comforting of the traitors, knowing them to be such, makes a man guilty of treason;" and in page 613, the doctrine is laid down generally, and in very explicit terms: "In the highest capital offence, namely, high treason, there are no accessories, neither before nor after, for all consenters, aiders, abettors, and knowing receivers and comforters of traitors, are all principals, as hath been said."

Hawkins and Foster support the same doctrine. 1 *Hawk.* ch. 17, sec. 39. "Also there can be no doubt, but that he who, by command or persuasion, induces another to commit treason, is himself a traitor (for without question, by such means, he would be accessory to a felony), and it is an uncontroverted rule, that whatever will make a man an accessory in felony will make him a principal in treason." (See same doctrine in his 2d vol., chap. 29, sec. 2, quoted in the first volume.)

Foster, 341, says, that "it is well known that in the language of the law there are no accessories in treason; all are principals." "Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in the treason, unless the case be otherwise provided for by the statute creating the same," &c.

It is true that Judge Tucker has very elaborately discussed this subject, and combated the doctrine that all

are principals. I admit the truth of all the encomiums which the counsel for the defendant have pronounced upon that gentleman. He has all the illumination of mind, and all the virtues of the heart, which those gentlemen, with the view of enhancing the weight of his authority, have been pleased to ascribe to him. What they have said of him from policy I can say of him from my heart, for I know it to be true. Yet give me leave, sir, very briefly to examine his argument upon this subject. His object is to prove that the position, that "in high treason, all are principals," is not law in England. The mode which he adopts to prove his point is this: He collates all the authorities which have supported this doctrine, and tracing it up with patient and laborious perseverance, with the view "*petere fontes*," he finds the first spring in the reign of Henry VI. That case is reported in the Year Book, 1 *Hen. VI.*, 5, and is very nearly as stated by Mr. Tucker from Stanford. It is the case of a man who broke prison and let out traitors. Stanford says it was adjudged petit treason; the Year Books merely say that he was drawn and hanged. A sentence in those days, when the notions and punishment of treason (notwithstanding the statute of Edward), remained still unsettled, is no very unequivocal proof that his crime was petit treason.

Mr. Tucker thinks this case not correctly reported, and that the grounds of the judgment seem not well understood. It may be easily understood, there being but a few short lines. It is to be recollected, however, that these Year Books, as we are told by Blackstone, serve as indices to the records in the several offices in Westminster. Then Coke, Hale, Hawkins, Foster, and all those who have relied on this case, as establishing the doctrine in question, guided by the marginal reference in the Year-Book, had it in their power to examine the whole original record in the case, and thereby to understand the entire grounds on which that case proceeded. From their great industry and prodigious research, there can be no doubt that they did so, and that they have therefore stated the principles of this case correctly. This case, therefore, does not warrant his deductions. Chief Justice Hussey, in 3 *Hen. VII.*, about six years after the first decision,

and consequently with much better means of understanding its nature, extent, and boundaries, than we can possess, refers to it as asserting the doctrine that in treason there are no accessories, but all are principals. Nor is it to be believed that this doctrine originated in the reign of Henry VI. The earliest reported case, indeed, which has come down to us, occurred in the first year of that reign. There is nothing, however, in the manner of the report which marks it as a case of the first impression; on the contrary, the sentence seems to have been a thing of course; and the judges of that day appear, in the language of Blackstone, to be merely pronouncing the immemorial custom of the land. It was the business of those judges to have decided the law, but it was sufficient to have given the law generally, as they believed it to exist; nor is it to be presumed that they introduced the principle into the English law, but that, acting on the common law of England, they pronounced sentence conformably to it. The learned and laborious Hawkins, speaking, no doubt, after the most profound and extensive research, declares in a passage before cited, that it seems to have been never doubted that in treason all are principals; and most certainly from a very early period in the fifteenth century to the present day, the doctrine has not been questioned in England. After such a lapse of years and centuries, after such full and perfect consent and concurrence among all the judges and writers of England, it would be bold in us to say, that this is not the law of England. And after all, the learned Judge Tucker rests the fabric of his reasoning on the ground of the imperfection of the first report; an obstacle which, however insuperable to him, was easily to be surmounted by those great men who had access to the original record; and who, having that access, have affirmed, that the case justified the doctrine which they advance. Let me conclude my remarks on Judge Tucker, by observing that however sincerely I revere him, yet certainly when the question is, "What is the law of England?" it cannot be considered as disrespectful to our learned and virtuous countryman to prefer the authority of such men as Coke, Hale, Hawkins, and Foster, to his. It is on the authority of these distinguished men that I shall rest my con-

clusion that the opinion of the Supreme Court of the United States is in harmony with the English law.

But we are told that all this is elementary and theoretic, and we are not to regard such men as I have just mentioned, but that there are no practical decisions in support of the principle, except of some few judges unworthy of respect. Suppose this were so; would you not be contented with the authority of Coke, Hale, Hawkins, and Foster? Would you require higher authority for the law of England than their names? I believe no court would say that better authority could be produced. Would a case from the Year Books or State Trials be preferred? Certainly not. The three cases, however, from the Year Books, in the reigns of Henry VI. and VII., on which Judge Tucker comments, are adjudged cases which avow the principle. In addition to this, he refers (in the margin) to several cases in the reign of Edward III., which I have not had time to examine, but which it is presumable, from his learning and accuracy, are properly cited in support of his doctrine.

The gentleman (Mr. Wickham) says that the books only show two cases of accessories before the fact having being adjudged guilty as principals, but he admits that there are several cases of accessories after the fact being so adjudged; and he seems to be apprehensive that we shall reason from these latter cases to the case of an accessory before the fact. I do not know that it is important, but the truth is, that the gentleman, unintentionally, no doubt, has inverted the order of guilt in this case. I apprehend that no case can be found which will show that accessories after the fact are as criminal as those before the fact. It was for a long time doubted, in England, whether accessories after the fact were principals; but it was never doubted that accessories before the fact were principals. This we are expressly told by Hawkins, in his 2d volume, ch. 29, sec. 3: "It was formerly a question whether the same receipt of an offender, which will make the receiver an accessory after the fact in case of felony, will make him a principal in high treason, as it seems to be settled at this day that it will;" and this doctrine is certainly correct. In reason, the accessory before the fact, he who procures the act or assists in bringing it

about, is certainly much more guilty than the accessory after the fact, who, having no previous knowledge of the fact, much less any agency or instrumentality in bringing it about, merely receives and comforts the man who has done it. It is therefore supported by the highest authority, as well as by reason, that the accessories after the fact were not as guilty as those before the fact; and were we to reason as the gentleman apprehends, we should reason very correctly from the weaker to the stronger principle. I think, however, I shall show by and by that these accessorial doctrines have nothing to do with the case at bar. The gentleman next read the case of Sir Nicholas Throgmorton's sufferings, as they are presented as a Gorgon's head by Judge Tucker, not as an illustration of the law, but by way of exciting our horror against a corrupt judge. We do not rely upon the authority of that case. What can be the motives which the gentleman had in view in reading this case with a countenance and cadence of such peculiar pathos? Was it to excite our sympathies, under the hope that our apprehensions and feelings when once set afloat might for the want of some other living object be graciously transferred to his client?

It was with the same view, I presume, that the gentleman gave us the pathetic and affecting story of Lady Lisle, as it is touched by the elegant, chaste, and delicate pencil of Hume. It was with the same views, also, that he recited from the same author the deep, perfidious, and bloody horrors of a Kirk and a Jeffreys. Sensible that there was nothing in the virtues of his client or in this cause to interest us, he borrowed the sufferings and the virtues of a Throgmorton and a Lady Lisle to enlist our affections and set our hearts a-bleeding, hoping that our pity thus excited might be transferred and attached to his client. I hope that we feel as much horror at the infernal depravity of Judge Bromley and the sanguinary and execrable tyranny of Judge Jeffreys as they or any other gentlemen can feel. But these cases do not apply to merciful and immaculate judges. We cannot think it very complimentary or respectful to this court to adduce such cases. They seem to be held up *in terrorem*, from an apprehension that their authority would be admitted here; but we apprehend no such consequence.

But he says that since the revolution of 1688, the British decisions have leaned the other way, and go to show, that accessorial acts do not make a principal in treason. How is this conclusion obtained? By any adjudged case? No. By any *obiter dictum* of a judge? No. How, then, does the gentleman support the idea of this change in the English law? He has drawn the reference from the impunity of those who aided the pretender, who fought his battles, or aided him in his flight. This is a new way of settling legal principles. Sir, this was the mere policy of the house of Hanover. The pretensions of the Stuarts had divided the British nation. Their adherents were many and zealous. Their pretensions were crushed in battle. Two courses were open to the reigning monarch; either by clemency and forbearance, to assuage the animosity of his enemies, and brace his throne with the affections of his people, or to pursue his enemies with vengeance, to drive them to desperation; to disgust his friends by needless and wanton cruelty, and to unsettle and float his throne in the blood of his subjects. He chose the former course; and because either from magnanimity, or policy, or both, he spared them, he supposes that the law of treason was changed, and that they could not be punished. To prevent this inference, according to the reasoning of the gentleman, it was necessary to have beheaded or hung up every human being who even aided the unfortunate Charles in his flight. Mr. Wickham has mentioned Miss Macdonald; and he would have the monarch to have hazarded the indignation and revolt of a generous people, by seizing that beautiful and romantic enthusiast, Flora Macdonald, and dragging her from her native mountains, in the Isle of Skye, to a prison and to death! The truth is, as we are told by Dr. Johnson, in his Tour to the Hebrides, that this step, impolitic as it was, nevertheless was hazarded, though but partially. She was carried to London, but, together with M'Cleod, who had aided in the same flight, was dismissed on the pretext of the want of evidence. But certainly the forbearance of the house of Hanover to punish under an existing law is no argument of the change of that law. Unable to sustain this novel idea that the law of treason has been changed since the revolution, either by *adjudi-*

cation or *dictum*, he endeavors to support it by inference, and next infers from the form of the indictment in *Foster*, 3–6, that presence at the overt act is indispensable to the treason of levying war. That indictment lays two overt acts of the treason; first, the general overt act of assembling with an armed multitude and levying war; secondly, the entering and taking the town and castle of Carlisle. From the special nature of which last overt act, the gentleman deduces the conclusion that the first was not sufficient, and that the last must necessarily have been proven to sustain the indictment. But is it anywhere decided that this last overt act was necessary? In Lord Balmerino's case, 10 *State Trials*, 605, also cited by Mr. Wickham, where the indictment was precisely that in Foster, it is argued by the counsel for the crown, and admitted by the court, in effect, that the proof of the second overt act was unnecessary; that it was immaterial whether the evidence showed him to have entered and taken the town of Carlisle or not; that it would be sufficient to prove the first overt act of levying war. Hence it is obvious, that the specification of entering and taking the town of Carlisle was unnecessary and superfluous, and that no inference can be fairly drawn from the insertion of it in the indictment. But it is strange that the gentleman should attempt to draw, from the mere form in this indictment in Foster, the conclusion that the law of England was changed, and that an accessorial act would no longer make a principal in treason, when Foster himself lays down the reverse of this principle, in the passage which I have before cited, and declares that all who are leagued in the conspiracy to levy war are guilty of the levying; without admitting any distinction, whether absent or present, or whether the war have been levied by a few or by all. The same remark applies equally to the inference attempted to be drawn from the cases of Deacon and Wedderburn, reported by the same author.

I think, sir, that the doctrine is now sufficiently established that, according to the English law, or the constitution of the United States, as expounded by the rules of reason and moral right, or by the Supreme Court of the United States, every one who bears a part in any conspiracy to commit treason, if any overt act have been

committed, is guilty of treason ; and consequently, that the prisoner's presence on Blannerhassett's Island, at the time of the overt act, was not necessary to the constitution of his guilt ; and, therefore, that there is nothing in the gentleman's first objection to prohibit the introduction of further proof.

But the gentleman, after having gone far through a wilderness of investigation in England, has come back to the United States. He has taken some positions which are not controverted, but which prove nothing. Being now on the general doctrine of principal and accessory, as they exist at common law, I will follow the gentleman through the whole range of his remarks on the subject. He said that accessories are the mere creatures of the common law ; hence, said he, when a statute is made in affirmance of common law, or in aid of it, all common law consequences follow. As when a statute is merely declaratory of a common law felony, whether the statute say anything about accessories or not, they are embraced by it, because they existed in the offence at common law ; but where the statute creates a new felony, not known at common law, as the statute of Henry VIII., making piracy a felony, accessories are not comprehended by it. Upon this groundwork he has built the argument that as we have no common law, the constitution and act of Congress which define treason stand alone ; and as they merely embrace those who actually levy war, and are, therefore, the principals, those who procure, or are otherwise accessory to it, are not comprehended ; and hence he concludes that the prisoner who merely brought about this treason by procurement is not within the constitution and act of Congress. This argument is perfectly characteristic of the ingenuity and subtlety of the mind which produced it. But let us examine and try the strength of it. The most remarkable feature of it is, that the whole of it is an emanation of that common law, upon whose non-existence in this country he founds his conclusion. His premises are laid in the common law, and he derives from the common law rule of interpreting the British statutes a principle which he applies to the interpretation of our constitution, and which gives him his result, *only* upon the *postulatum* that there is no

common law in the United States. But let us waive this objection, and examine his premises themselves.

First, Is it true that a statute made in affirmance of common law, or in aid of it, carries along with it all common law consequences? The book referred to by the gentleman does not prove it. 10 *State Trials*, 436, which he cited as authority, without producing it, is merely the argument of Hume Campbell, one of the counsel in the cause, and against whom that cause was determined. He was one of the counsel for the crown in the prosecution against McDaniel and others, and the persons accused were acquitted. I believe, sir, it is not usual for a gentleman citing an author in support of his doctrine to report the argument of counsel as the opinion of the court. But, admitting that the *dictum* of Hume Campbell were authority, *he* does not state the doctrine which he is cited to support; he says, merely, that "if a statute speak of *matters* known at common law, it must as to that *matter* be construed and extended according to the common law." In support of his position, Hume Campbell cites *Coke Littleton*, 381, *Hobart*, 96, and 6 *Modern*, 142. Of these three authorities, Mr. Wickham selected Hobart, as auxiliary to the State Trials. Hobart is an ancient book, not frequently found in modern libraries; he is not in mine; and from the abrupt manner in which this motion has been started upon us, and the extent of legal ground which it covers, I have not had time to hunt for that author through the town. Whether he support even Hume Campbell himself, or not, I am therefore unable to say. I shall suggest a reason presently, to render it probable that he does not. The other two authorities to which he refers do not support him. Coke Littleton has nothing like it. He gives, indeed, in the page referred to, three rules for the construing of statutes; as, first, that one part is to be expounded by another; second, that the words of an act of Parliament must be taken in a lawful and rightful sense; and thirdly, *that construction must be made of a statute, in suppression of the mischief and advancement of the remedy, et qui hæret in litera, hæret in cortice.* This is all he says upon the subject, and in all this we have nothing which resembles Mr. Hume Campbell's position. The other authority to

which he refers, 6 *Mod.* 143, it is remarkable, is also the argument of counsel, Serjeant Pengelly. This learned serjeant asserts, indeed, a principle which I believe to be true ; but it is one much more restricted and materially variant from that of Hume Campbell, and of course still more variant from that of Mr. Wickham. Speaking of the phrase "*arrest of judgment*," which had been cited in a statute of William III., as being a phrase known to the common law, he says, "When an act of Parliament makes use of such a term generally, it shall receive the same sense that the common law takes it in, and no other." In support of which, Pengelly cites *Hobart*, 97, 98, the very book and page cited by Hume Campbell to support his doctrine ; hence I think it probable that Hobart stops at the limits given by Pengelly. The result of the investigation is, that Mr. Wickham's broad principle, that a statute made in aid or affirmance of the common law carries with it all common law consequences, is reduced to this, that when a statute cites a common law phrase or term, that phrase shall receive the same sense or interpretation in the statute which it had at common law — a principle to which he is very welcome, but which will do him no manner of good ; so that down comes one of the pillars which supported this air-drawn argument.

But the gentleman takes another position, that "if a new felony be created by statute, no common law consequences follow." If the gentleman meant to say, that when a statute created a felony, common law consequences did not follow, the position is not true. In support of this doctrine, the gentleman refers to 1 *Hale's Pleas of the Crown*, 354, 355 ; and the authority at first view seems to countenance it ; but it only requires to be more closely and extensively examined to perceive that the passage, in the light in which Mr. Wickham understands it, is not law. The passage is this : "If a man be attainted of piracy before commissioners of oyer and terminer, grounded upon the statute 28 *Hen. VIII.*, cap. 15, by indictment of twelve men according to the course of the common law, he forfeits his lands and goods by the statute 28 *Hen. VIII.*, cap. 15 ; but this works no corruption of blood, because it is an offence whereof the common law takes no notice, and though it be enacted they shall

suffer and forfeit as in case of felony, yet it alters not the offence." In support of this, Hale cited 60 *P. C.*, cap. 49, page 112; but he adds, *vide tamen contra, Co. Lit.*, sec. 745, page 391. The passage in the latter author is thus: "There is also a felony punishable by the civil law, because it is done upon the high sea, as piracy, robbery, or murder, whereof the common law did take no notice, because it could not be tried by twelve men; if this piracy be tried before the lord admiral, in the Court of the Admiralty, according to the civil law, and the delinquent there attainted, yet it shall work no corruption of blood, nor forfeiture of his lands; *otherwise it is, if he be attainted before commissioners by force of the statute of* 28 *Hen. VIII.*" Hence it appears that the common law consequences of attainder depended on the tribunal, the form of trial, and the law under which the pirate was tried; since, if tried before commissioners *under the statute*, the common law consequence of attainder did follow, although the felony did not exist at common law, but was newly created by statute. *Hale* himself, in page 355, qualifies the generality of his expressions in the passage just read. In the paragraph immediately succeeding, he takes up the first branch of the position just read from Coke: "If a man be attainted, *before the admiral*, of treason or felony committed upon the sea, &c., *according to the course of the civil law*, yet it works no corruption of blood, &c., *the manner of the trial being according to the course of the civil law*," &c. He proceeds, "*If there be an attainder of treason or felony done upon the sea, upon this statute of* 28 *Hen. VIII., by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood; because the commission itself is under the great seal, warranted by act of Parliament, and the trial is according to the course of the common law*," &c. "And with this agrees *Co. Litt.*, sec. 745, page 391; nay, I think further, that if the indictment of piracy before such commissioners upon the statute of 28 *Hen. VIII.*, be formed as an indictment of robbery at common law, viz., *vi et armis et felonice*, &c., that he might be thereupon attainted, and the blood corrupted." Hence, in the opinion of Hale himself, it depended upon the form of the indictment and the tribunal, whether the common law consequence

of attainder would follow a conviction for piracy on this statute. The result is, that although a statute does create a felony unknown to the common law, yet common law consequences may follow a conviction upon it; which is precisely the reverse of the position contended for by Mr. Wickham. But if this point were conceded to the gentleman as it relates to *attainder*, it would not avail him; because in order to extract from the common law the rule which he applies to the construction of our constitution and act of Congress, he must show that, when a statute creates an offence, and is silent as to accessories, no accessories are embraced by the statute. It will perplex him to do this. As far as I have been able to trace the subject, the doctrine is this: that when an act of Parliament makes an offence and says nothing of accessories, they are nevertheless embraced, although it is true, that the peculiar wording of a statute may prevent that consequence. This doctrine is supported by 1 *Hale*, 613. "It remains, therefore, that the business of this title of principal and accessory refers only to felonies, whether by the common law or by act of Parliament. As to felonies by act of Parliament: regularly if an act of Parliament enacts an offence, *though it mentions nothing of accessories before or after*, yet virtually and consequentially those that counsel or command the offence are accessories *before*, and those who knowingly receive the offender are accessories *after*, as in the case of rape, made felony by the statute of Westminster, 2 cap. 34." In page 614, "Though generally an act of Parliament *creating a felony* renders *consequentially accessories before and after within the same penalty*, yet the special penning of the act of Parliament in such cases sometimes varies the case. Hence it is, from the special penning, that the statute of piracy extends only to principals." In page 632, he lays down the same doctrine as in other felonies, so in this, there are or may be accessories before and after, for though this be a felony by act of Parliament, that *speaks only of those who commit the offence*, yet *consequentially and incidentally accessories before and after* are *included, and so in every new statute, making a felony without speaking of accessories before or after.*" In page 644, *Hale* treats of the new felonies made in the times of

Henry IV., Henry V., Henry VI., Edward IV. The statute of 5 *Hen. IV.*, 6 cap. 4, was a statute to prohibit the multiplication of gold or silver; that is, alchemy. [*Vide* 1 *Hale, P. C.*, 644, and *note a.*] This was an offence not existing in any shape at common law; and existing never anywhere, in truth, but in imagination. In this page, he says, "And *although the statute* mentions not accessories before or after, yet this statute making the fact felony doth *consequentially subject accessories before and after to the penalty;* though this be made a *quære* by *Dyer*, 88, in Eden's case, yet *it seems now settled*, according to the opinion of my Lord Coke, *P. C.*, cap. 20, *that there may be accessories to this new felony before and after.*"

Here the authority is conclusive of the point, that although a statute creates a new felony unknown to the common law, and although it says nothing about accessories, they are nevertheless comprehended as a necessary consequence or incident; so that when a statute introduces or makes a new *felony ex vi termini*, the accessories follow as a necessary common law consequence. There can be no case of a *principal*, where the accessory does not follow as a natural and inevitable result, unless it be excluded by the special expressions and provisions of the statute creating an offence or felony, which was not so at common law.

I refer you also, sir, to page 704, of the same author, where the doctrine is refuted, and where, on the authority of Sir Edward Coke, it is carried so far as to state, that when a statute makes a felony, and expressly comprehends accessories before the fact, being silent as to those after it, yet notwithstanding the maxim, "*Expressum facit cessare tacitum*," accessories *after* are virtually included. His words are, "An act, making any offence to be felony, though it speak not of accessories before or after, yet they are impliedly contained. Nay, though the statute make an offence to be felony in them that commit it, and their counsellors, procurers, and abettors to be felons, and speak nothing of accessories after, yet by the opinion of my Lord Coke, receivers or accessories after are also virtually implied."

From this examination, two conclusions are fairly deducible:—

First, That when a statute creates a new felony, unknown to the common law, although such statute says nothing about accessories to that felony, yet they exist, and are punishable under the act.

Secondly, That accessories are not the mere creatures of the common law; they may derive their existence from a statute *solely;* and *that* by mere implication under that statute. What, then, becomes of the gentleman's nice tissue? It breaks and vanishes at the touch.

Since, then, accessories are not the creatures merely and solely of the common law, it makes no difference whether the common law exist here or not; accessories may nevertheless exist.

Since a statute creating an offence impliedly embraces accessories, not by the operation of common law, but by the reason and nature of things, an American statute may impliedly embrace accessories, since whatever we may think of the existence of the common law in this country, no American, I hope, will doubt that reason and its deductions exist here.

The only fair inference from his positions and authorities is, that if a statute of the United States were to adopt a common law *phrase,* in the creation of an offence, no common law consequences would follow, because we have no common law.

But this is a moot point, because while the constitution and act of Congress adopt the word *treason,* they define in what it shall consist. I see no benefit that the gentleman could derive from these positions, if they were admitted. If he meant to say, that accessories are the mere creatures of the common law, and therefore cannot exist in this country, where there is no common law, I answer,—

First, That if the position were true, it would not affect this case, because within the reason of the doctrine touching principal and accessories, the part which the prisoner bore in this transaction would constitute him a principal.

Secondly, If his conduct were of such a nature as to make him an accessory, I hold that we have a right to look to the common law, to ascertain whether he be not a principal in this case.

First, I contend that the part which the prisoner bore in this transaction would constitute him a principal.

Gentlemen say, that all are accessories who are not present at the commission of the offence. We, on the contrary, contend, that even in inferior felonies, a man may be a principal without actual presence. Let us examine this question. The law recognizes a *legal*, as well as an actual presence. Before I refer to the books to explain this distinction, I beg leave to make one remark, that in order to determine the degree of proximity which should be between the principal and accessory, it is necessary to look into their acts, and consider the nature of the crime and the extent of the theatre which it requires for its perpetration. A man may be *legally* present, although *actually* absent; even in felony, *legal* presence makes a man as much a principal as *actual* presence. I beg leave to introduce a series of cases which go to unfold and establish this distinction, most of which my friend Mr. Mac Rae has already mentioned. You will find, in the progress of these cases, the sphere of legal presence perpetually extending itself in proportion to the nature of the crime and the extent of theatre necessary for its commission. You will observe that, as the theatre widens, the scale of proximity is extended. The first case is in *Hale*, 439: "If divers persons come to make an affray, and are of the same party, and come into the same house, and one be killed in one of the rooms, those that are of that party, and that came for that purpose, though in other rooms of the same house, shall be said to be present." Here the house is the theatre, and it is required that those who are to be implicated as principals shall be in the other rooms of the same house. The next is the case of the Lord Dacre. [Here Mr. Wirt read it, which see before, quoted by Mr. Mac Rae.] Here, as the park was the theatre of the meditated crime, the scale of proximity is enlarged, and it was enough that the Lord Dacre and his associates were in the same park, to implicate them in the guilt.

The next is Pudsey's case, which is thus stated in 1 *Hale*, 534: "Pudsey and two others, viz., A and B assault C to rob him in the highway; but C escapes by flight; and as they were assaulting him, A rides from Pudsey and B, and assaults D, out of the view of Pudsey and B, and takes from him a dagger by robbery, and came

back to Pudsey and B ; and for this Pudsey was indicted and convicted of robbery, though he assented not to the robbery of D, neither was it done in his view, because they were all three assembled to commit a robbery ; and this taking of the dagger was in the mean time."

Here, as the highway and the whole forest was the scene of action, a still less degree of proximity was required than in either of the preceding cases ; and, indeed, no limit of proximity is stated at all. But this case of Pudsey is irresistibly strong in another point of view, and contains a principle which covers the case at bar completely. He and his colleagues were leagued for the general purpose of robbing ; they went out upon this purpose ; and although Pudsey was not only absent at the particular act of robbing D, but gave no assent to that particular act, yet he was involved in the guilt of it, and suffered accordingly.

The same author, page 537, contains a case which is, if possible, still stronger to the same purpose ; it is the case of two men, who go out for the purpose of robbing on the highway or committing a burglary ; although one only commits the offence, and the other, so far from being present, is actually engaged in the perpetration of a different offence, at a different place, yet this other is equally involved in the offence committed by the first. Hence it is not actual presence which makes a principal in felony ; it is merely their going forth leagued in the same general design, and their readiness to co-operate for effecting the common purpose. Suppose two men, in the county of Bedford or Campbell, should concert the murder of a man who had removed from thence to this place, and should set off together to effect that purpose, but that, not knowing whether he had fixed his residence in Richmond or Manchester, they should on their arrival separate ; one should enter Richmond and the other Manchester ; they both agree and determine that he who had the first chance should kill him ; and they also agree to return together, and to assist and protect each other. He who enters Richmond commits the murder. Would not the other, who went into Manchester, be a principal in the murder ? They were both engaged in the same unlawful design of murdering the same individual. They set off

together, and intend to return together. There was a concert between them, and each was ready to co-operate with the other in carrying this murderous design into effect. Here, then, is a case of a *legal* presence, though the person is actually absent, involving him in the guilt of actual presence. *Foster*, 349, 350, thus treats the subject: "When the law requires the presence of the accomplice at the perpetration of the fact, in order to render him a principal, it doth not require a *strict, actual, immediate presence*," &c. [See this quotation quoted before.] The reason of the law is the soul of the law. What is the reason, then, which, according to Foster, constitutes this *legal* presence? It is *that the cause is a common cause;* that each man operates in his station towards the same common end; that the part each man takes tends to give countenance, encouragement, and protection to the whole gang, and to insure the success of their whole enterprise. Whoever in any crime performs a part within this description is *legally present* and a principal in that crime. *Foster*, in pages 353, 354, after stating that general resolutions against all opposers, whether explicitly entered into, or to be collected from their numbers, arms, or behavior at the scene of action, had always been considered as strong ingredients in cases of constructive presence, concludes thus: "In cases of homicide, committed in consequence of them, every person *present in the sense of the law* when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow. The offences that Lord Dacre and Pudsey stood charged with as principals, *were committed far out of their sight and hearing;* and yet both were holden to be *present. It was sufficient that, at the instant the facts were committed, they were of the same party, and upon the same pursuit,* and *under the same engagement and expectation of mutual defence and support, with those who did the facts.*"

Let us apply the reasoning and principles of those cases to the case of Aaron Burr. In order to do this with propriety, we must consider the nature of the crime charged upon the prisoner, the theatre required for its perpetration, and the various parts to be performed in promotion of the general purpose. We must consider the difference between treason and felony; that treason occupies a much

wider space; that if there have been an act of treason in this case, it may be said to have covered the United States; and therefore you will not require the same degree of proximity between the accessory and principal, as you would in a common felony. I proceed, then, to make this application. The charge in the indictment is treason, in levying war against the United States. The objects imputed to the prisoner are the seizure of Orleans and the separation of the states. *Was not Aaron Burr of the same party, with the same design, and upon the same pursuit? Did he not first create the party? Did he not enlist the men, and engage them in his project? And did they not all call themselves his men? Were they not all under the same engagement and expectation of mutual defence and support?* Was it not a common cause with them? Did he not place each man to operate *at his station*, at *one and the same instant towards the same common end?* Did not the part which each man took *tend to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise?* Was not the prisoner *within* every reason and principle assigned for the constitution of *legal* presence, and therefore a principal in the treason? If it be urged that the prisoner gave no express assent to the particular meeting on the island, it may be answered, that neither did Pudsey, in the case cited, assent to the particular robbery of D by A; but Pudsey and A had the same common purpose, which involved them in the same common guilt. So the purpose of the prisoner and the men upon the island was a common purpose; and therefore their guilt is the same. But an error seems to have arisen in considering the overt act as the treason; the overt act is only the evidence of it. The moral guilt is in the intention. The overt act or assemblage on the island was not the object, the end, the consummation of the treason; it was a mere transient effect of it, an incidental evolution of the design. We must not therefore apply the doctrines just investigated to the act on Blannerhassett's Island. We must consider the prisoner's local position, not in reference to the assemblage, but to the general and grand object of the treason; not in reference to the island, but to the great theatre which the

treason required, and on which it was acting from New York to Orleans. For the object was not Blannerhassett's Island, but the empire of the west, formed in the north ; the splendid purpose of seizing Orleans, and rending the whole Union forcibly asunder. The whole country from Beaver to New Orleans was the scope of action. Burr therefore was not only legally but actually present on this theatre of action. In those cases of felony the proximity between the accessories and principal actors was measured according to what was intended to be done. Here the object was not an *island*, but a *kingdom;* the theatre of action was much more extensive, and the proximity between the parties engaged in it must be proportionably enlarged. The part which the prisoner took in this transaction is such as in the case of felony would make him a *principal*, and not an accessory, as the gentlemen contend ; and consequently, according not only to the reasoning of all those cases, but to their own arguments, the prisoner must be considered as a principal in the treason.

Secondly. Let me inquire whether we have not a right to look at the common law, to show that the prisoner is a principal. Let us admit, for the sake of argument (what is certainly disproved), that accessories are the mere creatures of the common law ; let us also admit, that our constitution and act of Congress do not embrace accessories ; is it clear that we have no right to resort to the common law to implicate accessorial traitors ? I do not know myself that this inquiry is necessary ; nor do I pretend to say what may be the result of your reflections on the subject ; it may appear to you necessary, and I would leave no subject untouched which the court may consider as involved in the debate.

It would not be very bold in me, sir, to argue for the existence of the common law *en masse*, in this country. But let it not for a moment be understood that I mean to contend for this. I only say that it would not be very bold in me to do this, and I say so because a majority of the federal judges, so far as their opinions have been made known, have held that opinion. In Worrel's case, cited from Dallas, the court was divided : Judge Chase thought the common law not in force ; Judge Peters thought otherwise. In a subsequent case, and that a criminal one, — I

mean the case of Williams, — Judge Ellsworth held the whole of the common law to be in force; and Judge Tucker informs us that Judge Washington was also of opinion that the common law of England is in force here. These are all the opinions of which I have heard. Having thus the majority of the federal judges, as far as their opinions are known, in favor of the opinion that the common law of England is in force here, I repeat, that it would not be very bold in me, standing before a federal court, to insist on the full operation of the common law, with all its consequences and imputed offspring, *accessories* among the rest; but I will not avail myself of this "vantage-ground." My own opinion is a different one. I take the principle with much greater restriction, and on this head submit these reflections to the consideration of the court.

When a technical term is borrowed from any art or science, we look to that art or science to ascertain its import and signification.

If a statute adopt phrases of the common law, we must look to the common law to ascertain their true signification. This is a rule of reason. It is the foundation of the principle cited by Serjeant Pengelly from Hobart, that when a statute adopts a common law term, you take that term in its common law meaning. It is the foundation also of a paragraph in one of the most luminous, elegant, and masterly state papers that ever the world saw: I mean the celebrated report of the Virginia committee in 1799, 1800, from which I beg leave to read a short extract relative to our present inquiry. "Deeply impressed with these opinions, the General Assembly of Virginia instruct the senators and request the representatives from this state in Congress, to use their best efforts to oppose the passing of any law, founded on or recognizing the principle lately advanced, that the common law of England is in force under the government of the United States; excepting from such opposition such particular parts of the common law as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and excepting also such other parts thereof as may be adopted by Congress as necessary and proper for carrying into execution the

powers expressly delegated." Here we find the recognition of the principle which takes common law phrases in the common law sense. Upon the same ground, Judge Iredell, in the case of Fries, states, in effect, that the constitutional terms of *our* definition of treason being borrowed from the British statute, the framers of our constitution intended to adopt the meaning of those terms as expounded in the parent country.

Suppose an act of Congress were passed, which said that a particular act should be *felony*, and said no more on the subject; where would you look for its true meaning? Would you not, by the adoption of that *word*, find it necessary to look at the source from which it was derived, that is, the common law, in order to ascertain its import? There is no other to which you can look for that purpose. Let us examine how these considerations bear on the point, that we have a right to look at the common law to ascertain whether accessorial traitors be implicated. In applying these principles, we must inquire particularly into the nature of treason in levying war. Whence do we derive this particular treason? Sir Edward Coke, in his 3 *Institute* 9, referring to the statute of Edward III., gives us a commentary on it, divides it into members, and expounds each of them as he goes along. He says that it has done nothing new, that it created no new offence which was not an offence at common law, but excluded some treasons and abolished and mitigated some of the punishments and penalties which existed at common law. When he comes to the words of the statute, "*si un home leve guerre encounter notre seigneur le roy*" (if a man levy war against our lord the king), he says, that "this was high treason by the common law." Although, then, the words of our definition are derived immediately from the statute of Edward, and though it received the sanction of Parliament, this species of treason, levying war, was an offence at common law, and has been transplanted from the common law into our constitution. Have we not then a right to go to the fountain-head and ascertain there how much ground it covered, what was the nature of the treason, what its extent and limits? I do not speak of common law treasons at large, but this particular treason of *levying war*. Gen-

tlemen will understand me. I do not mean to sanction any of the absurdities of the common law. I speak only of this *single branch of treason*, selected by the constitution. If, then, we have a right to go to the common law for this purpose, we shall discover that it comprehended all who were leagued in the general conspiracy, whether they themselves actually levied the war, or caused it to be levied by others. I submit this idea to the court, not as one which I have had time to weigh and digest, but one which it may perhaps find not unworthy of consideration.

But without resorting to the aid of the common law, we show by the constitution, interpreted by the rules of reason and moral right, and as expounded by judicial decision, as well as by the English law, to which we were invited, that presence at the scene of the overt act is not necessary to make a man a traitor. Before I conclude this point, I beg leave to notice some remarks of Mr. Wickham's on the act of Congress touching crimes against the United States. He says that Congress were aware that the common law was not in force here, and consequently that accessories, who are the creatures of the common law, would not be embraced by an act creating a felony in general terms. He infers this from their having prescribed the punishment of accessories in the case of piracy, and those who rescue after conviction of treason.

I will make this remark on the act of Congress : whenever it mentions accessories to any crime, it is for the purpose of distinguishing between the guilt, and consequently the punishment of accessories before and after the fact. Accessories before the fact, in piracy, are punished with death ; those after, by fine and imprisonment. The same principles are observed with respect to accessories before and after in other cases. If you will look into the statute itself, you will find that an inference very different from that drawn by Mr. Wickham ought to be deduced from it. According to his argument, even if the common law were in force here, accessories would not be liable. Congress knew that in treason all are principals, and that therefore it was unnecessary to implicate them in detail by a special act ; but knowing that those who were the most innocent, who were in the least concerned in that crime, were before them equally pun-

ishable with the most atrocious offenders, they intended to mitigate the fate of the least culpable, as receivers and comforters after the fact, and rescuers of those who were not convicted. They felt that they were treading on ground which was previously occupied. They did not legislate on the subject as if they were creating an offence. They speak of it as an offence already existing. They distinguish between the degrees of guilt, and proportion the punishments accordingly.

At common law, the man who broke jail was equally punishable with the criminal who was confined. The act of breaking the prison was as heinous in the law as the offence of the person imprisoned. He was in felony an accessory, but in treason was of course a principal; but in either case he would not be convicted till the crime of the party imprisoned were first established by conviction. In all offences, except treason, a distinction was made between accessories *before* and *after* the fact, varying the punishment according to the degree of the offence; inflicting the heavier on the accessories before, and the milder on those after, or mere receivers and comforters. Congress have in some degree extended the same rule of reason to offenders in treason. I consider the correct interpretation to be, that Congress, looking over the whole, inflict the heaviest punishments on the most flagrant offenders. But, according to Mr. Wickham's argument, accessories before the fact in treason, who are in general the greatest offenders, because the procurers and contrivers of the crimes, would escape altogether, whilst the least guilty are severely punished!

Before you think that Mr. Wickham's idea is correct, you must believe that Congress meant to punish the lesser, and leave entirely unpunished the greater offence. Was it possible that they could have intended that the dark, designing, flagitious offender, who intrigues and contrives, who plots and procures, a deep conspiracy to subvert the government and destroy the liberties of his country, shall escape wholly unpunished, while the poor ignorant man, who is deluded by his artifices, or those of his associates, shall be severely punished for rescuing from imprisonment another of the deluded victims of his ambition? Yet this result, as monstrous as it is absurd,

may take place if Mr. Wickham's construction shall be adopted.

But suppose I am wrong in all these things ; that the constitution is not to be interpreted by reason and moral right ; that actual presence is necessary ; that the court is now disposed to retract the decision of the Supreme Court, and determine contrary to the decisions in England ; would you, for these reasons, exclude the rest of the evidence ? Must not the jury decide the question ? Is this a question of law, which the court has a right legally to determine ? Is not this a question of fact, proper to be settled only by a jury ? Will this court say that it will take place of the jury ? Are not the jury the exclusive judges of these facts ? The overt act consists of a series of facts, and to decide that it has or has not been committed, has never yet been denied to be the province of the jury alone. It is the very question made by the issue on this cause. It is the very question which the jury have been sworn to decide. If the court should exclude all further evidence, will not this amount to saying that we have not proved the overt act to the satisfaction of the *court ?* that the evidence we have introduced, and all we propose to introduce, will be insufficient to prove the overt act ? And will not the court thereby forestall the jury in the very question which they are sworn to try, and wrest it from them by a *coup de main ?* Gentlemen indeed try to give this question a legal attitude, by contending that other evidence will be irrelevant, until the fact of presence shall be proven ; but then, in order to decide this question in the affirmative, the court must assume the functions of a jury, and say that the overt act is not and will not be sufficiently proven without it. But suppose this question as to the necessity of presence a question of pure law, still it would be a question which the jury would have a right to decide, since the law as well as the fact is completely within their power. The court may, indeed, after all the evidence shall be given, instruct the jury as to the law. It may instruct them as to what will constitute an overt act of levying war. But nothing more clearly shows the sovereign power and control of the jury, both over the law and fact, and that

they are to decide according to their own impressions alone, than this, that even after such instruction of the court, they may, if they choose, decide the case in opposition to such instruction. I do not say that they will do it, or that they ought to do it, but I say that they may do it, if their conscience shall so direct; and I say this by way of showing the paramount power of the jury over the very question now sought to be withdrawn from them and given to the court. I conclude this point, with assuming it as proven, that actual presence was not necessary to make the prisoner a principal in the treason; and if the court shall think it was, that this is a question which cannot be taken from the jury. This first objection, therefore, furnishes no legal bar to the introduction of our evidence.

I proceed to examine the gentleman's second point. It is this: "No further evidence is admissible under this indictment, because the fact must be proved as laid;" and as the indictment charges the prisoner with levying war on the island, where it is proven he was not, there is an end of the case; no further evidence can be let in under this indictment.

Under this head the gentleman began by commenting on the omission of the word *public* in the indictment. "Why did not the attorney for the United States charge the prisoner with levying *public war*, instead of merely charging him with levying war? Why was the word *public* left out?" And then, with a countenance insinuating even more than his expression, he asked "whether the word *public* were omitted to render the indictment more palatable to the grand jury."

The answer is a very simple one: the indictment was drawn from an authentic copy of the indictment in the case of Fries. It is an exact transcript of that indictment, *mutatis mutandis*. There the word *public* is not found. There was no intention to make it palatable to the jury. It would well have become the gentleman to have reflected more, before he urged such an objection, for I am sure he did not consider it with his usual accuracy. It is not necessary this word *public* should be in it. The indictment is founded on the constitution and act of Congress, and takes their definition of treason for

its basis. It is transferred from it *verbatim*. The constitution does not say that treason shall consist in levying *public* war against the United States, but simply in levying war against them. So, also, is the act of Congress, for as the country is not at war with any foreign power, there can be but one species of treason, that is, levying war against the country; there being no enemies to adhere to, or to give aid and comfort to. An indictment, therefore, pursuing that definition in express terms, is certainly sufficient to all intents and purposes. The word *public* is surely of no importance. The gentleman, indeed, on the second day of his argument, admitted that perhaps it was of no importance, and that he might have been mistaken in supposing this to be the first indictment in which it was omitted, as he found that it was omitted in the second, though not in the first indictment against Fries. It was natural to have expected, from his usual politeness and liberality, that the gentleman would have made some reparation for the ungenerous insinuation that the word had been intentionally omitted, in order to render the indictment more palatable to the grand jury. As he has not thought proper to retract it, but to let it remain where it was, be it so. The attorney has the consolation to know that his purity is to be estimated by his country, and not by the prisoner or his counsel.

But it seems that the indictment charges the act to have been done with divers persons who were *unknown;* and that instead of proceeding to prove that he did the act with persons unknown, we attempt to charge him with the acts of others by relation. This is a strange argument for the learned gentleman to have urged. I should have supposed that the manliness of his understanding would have rejected such an objection. He has, however, in the dearth of other materials, not only urged it, but attempted to support it by authorities. He does not pretend, indeed, that any author, elementary or practical, has ever asserted that this is necessary, or that any judge has declared it to be so; but he has inferred it from the specification of other names, in several indictments during the protectorship of Oliver Cromwell.

This is the mere *form* of almost every indictment for levying war. Lords Cromartie, Kilmarnock, and Balme-

rino, were all in arms together at the field of Culloden. They were taken prisoners together. They were severally indicted on the same day for the same offence; and although, therefore, it is clear that they were all known to the attorney for the crown, yet each indictment charges each prisoner to have levied war with persons *unknown.*

But let us examine the authorities to which he has referred. He cited the cases of Hewet and Mordaunt. I have examined those cases. They are not indictments for levying war. They charge the prisoners, among other things, with having procured and delivered military commissions to several persons, who are named in behalf of Charles II. The indictment against each of them does indeed state that the prisoner did plot and endeavor to stir up war against the protector and commonwealth; that he published and declared Charles Stuart, and held intelligence and correspondence with him. The indictment against Hewet charges that he did these things with others named, and conferred with and delivered commissions from Charles II. to John Stapely and Henry Mallory. The indictment against Mordaunt differs only in this, that he declared the treasons previously specified by *overt act*, that is, by conspiring with John Stapely and Henry Mallory how to effect the same; and that he did deliver commissions to *several persons* in the name of and as from the said Charles Stuart: but neither indictment states that the prisoner levied war with such and such persons, or that he levied war at all. Their offence, from the nature of it, required the naming of Charles II. and those to whom commissions were delivered. Hewet refused to plead, and denied the authority of those who tried him. He wished to see or hear read the commission by which they tried him, which was refused him. They entered up his having refused to plead, and then passed sentence upon him. I have already said, that in treason for levying war, the most usual form is to charge the war to have been levied with persons unknown, and *that* in cases where some of the persons were certainly known. The gentleman then says, that it is not enough to charge the prisoner with levying war, but that in the overt act we should have set out the particular acts which

were done by the prisoner, and the evidence by which we mean to charge him. I deny, sir, that this is law. The overt act does not make the treason: it is only evidence of it, and is inserted merely to show what is intended to be proved against the prisoner; it is introduced in the indictment to warn him of some particular act that will be proved against him, in order that he may prepare to meet and repel it with his defence. Whether or not we should have set out the particular acts done by the prisoner, is a question of law, and must be decided by authority. I refer you to 8 *State Trials*, 218, 219. *Foster*, 194, 213, 214, 220. 1 *East's Crown Law*, 121, 116. 1 *Hale*, 122. 4 *State Trials*, 722. Lowick's case, 4 *State Trials*, 696–7. Rockwood's case. In all of them you will find this principle clearly laid down, that whenever the treason of levying war is charged in the indictment, only one overt act need be charged, and that it is unnecessary to charge any more. Let me read the form of the indictment in one of these authorities: *Foster*, 213, 214, the case of Damaree and Purchase, for destroying the meeting-houses of Protestant dissenters. The indictments charged that the prisoners, "withdrawing their allegiance, &c., and conspiring and intending to disturb the peace, &c., did traitorously compass, imagine, and intend to levy and raise war, rebellion, and insurrection against the queen, within the kingdom; and that in order to complete and effect those their traitorous intentions and imaginations, they, on the day of at , with a multitude of people, to the number of five hundred, armed and arrayed in a warlike manner, &c., then and there traitorously assembled, did traitorously ordain, prepare, and levy war against the queen, against the duty of their allegiance," &c. Now, sir, in this indictment there is no particular act charged. The overt act charged is, *that five hundred men, armed and arrayed in a warlike manner, assembled*, &c., *and ordained and levied war*, &c. Now, in those cases, the acts which those men did, and which constituted their crime, were pulling down meeting-houses; but in the indictment there is not a word of meeting-houses, or any other houses; and the court upon solemn argument, and after a conference, decided unanimously that the indictment was sufficient, and let in the

particular evidence under it; and as to the overt act, stating the evidence on which we mean to rely, it is expressly declared by *East*, 121, on the authority of a variety of cases which he cites, that "it is not necessary that the whole detail of the evidence should be set out." "It is sufficient that the charge be stated with reasonable certainty, so that the prisoner may be apprised of the nature of it."

Mr. Randolph, when he came to speak on this part of the subject, went back to the time of the reign of Elizabeth, when, as he says, not a single beam of judicial light had touched the English horizon, and quoted a case decided in that reign, which is more in detail than the song of Chevy Chase, or Pope's History of the Parish Clerk. The indictment, which he read from the State Trials, exhibits, indeed, a legal curiosity; but the inference that this detail is necessary is refuted by express authority. *East*, vol. i. pages 124, 125, on various authorities informs us that it is sufficient in that species of treason (compassing the king's death) to lay as the overt act that A and B met and proposed the king's death; besides, what becomes of this inference from an indictment so much in detail, at a time when not a ray of judicial light had touched the British horizon, when, in these days of more splendor, it would be sufficient to state generally that the several persons accused met and compassed the death of the king; for modern indictments exhibit nothing of this tedious detail. An inference from these modern indictments, that this detail is not necessary, is certainly as fair as an inference from the ancient indictments that it is necessary. Thus your inferences are in conflict, and destroy each other. I refer you to the cases of Lacock and Rookwood, first cited for another purpose, to show that this minute and circumstantial *form* of indictment is exploded.

East, vol. i. page 116, is still more particular on this subject. After stating that, in every indictment for high treason, the particular species of treason must be charged, in the very terms of the statute of Edward, as the substantial offence, he adds, that "then some overt act must be laid, as the means made use of to effectuate the traitorous purpose." "The overt acts so laid are in truth the charge to which the prisoner must apply his defence; and,

therefore, it is in no case sufficient to allege that the prisoner compassed the king's death, or that he levied war against him, or adhered to his enemies; for upon a charge so general and indefinite, he cannot know what he is to defend. The particular acts of the compassing and adherence must be set forth; and in the other instance (that of levying war), it must be alleged *that he assembled with a multitude armed and arrayed in a warlike manner, and levied war;*" and thus it is alleged in our indictment. East proceeds: "The indictment against Purchase and Damaree, for pulling down meeting-houses, charged that they, with a multitude to the number of five hundred, to the jury unknown, armed and arrayed in a warlike manner, with clubs and stones, and other arms offensive and defensive, levied war against the queen. No exception was taken to the indictment by Damaree's counsel; but on behalf of Purchase it was objected, that there ought to have been an overt act laid of the treason; because there being such a variety of facts which amount to levying war, if the particular facts intended to be brought forward against the prisoner were not alleged, he could not know how to make his defence. *But it was resolved by all the judges, upon conference, that the indictment was good; and that levying war being an overt act of itself, no other overt act need be alleged.*" The indictments in those cases are, as I have already noticed, substantially stated by *Foster*, 213, 214; and the indictments themselves are to be found in 8 *State Trials*, 218, 219. Though the real crime was pulling down meeting-houses, nothing is said of them in the indictment.

Here *Mr. Wickham* begged leave to interrupt Mr. Wirt, in order to explain, as he said Mr. Wirt had misunderstood him. My argument, said he, was not that a special indictment was necessary in every case, but that whenever an *absentee* was charged and was to be made liable by relation for the acts of another, the manner of his being connected with that other should be stated in the indictment. For instance, I put the case of Blannerhassett. I never said that such an indictment as is now before the court would not be good against Blannerhassett, who was present at the time and place, when, and where the overt act is charged to have been commit-

ted. I believe I was understood by the court, because an explanation to the same effect was given before to another gentleman who had misconceived the argument.

Mr. Wirt. — I am obliged to the gentleman for his explanation, but I did not misunderstand him. He states that whenever a man is to be charged with levying war by relation, the indictment should specify the particular act which constitutes the treason. I answer, that if the accused have borne a part which constitutes treason, he is sufficiently and properly charged in this indictment. I have shown, that in every case where a prisoner has acted a part which amounted to treason, whether he be absent or present, he may be indicted generally, because he is a principal in the treason; and wherever a person accused is a principal in the treason of levying war, it is sufficient to charge that he did levy war. It is a general definition, authorized by the constitution; and if it be objected that such an indictment would be too general, because there would be no overt act laid, I answer, that it is sufficient to state in such an indictment for levying war, that a multitude (amounting to a particular number specified), armed and arrayed in a warlike manner, assembled and levied war, &c., and this construction is not only authorized by the constitution, but consistent with adjudged cases. The gentleman said that he referred to a number of authorities, to show that persons, attempted to be made traitors by relation, were specially proceeded against. I suspect that he will find no case to support his doctrine. He will find no case where a man, made a traitor by relation, has his acts detailed in the indictment. He will find no case, in which the conduct of a party accused amounts to levying war, where the indictment charges him more specially than our indictment charges the prisoner. But if such a case could be found, it would not be material, because the question is not what the practice is, but what the law is. In all the modern cases, since the British horizon has been enlightened by judicial wisdom, the indictments have been as we contend.

Chief Justice. — Do you mean to say that it is not necessary to state in the indictment in what manner the accused, who it is admitted was absent, became connected with the acts on Blannerhassett's Island?

Mr. Wirt. — I mean to say that the *count* is *general* in modern cases, that we are endeavoring to make the accused a traitor by connection, by stating the act which was done, and which act, from his conduct in the transaction, he made his own ; that it is sufficient to make this charge generally, not only because it is authorized by the constitutional definition, but because it is conformable to modern cases, in which the indictments are pruned of all needless luxuriances.

Mr. Wickham. — I do deny that there ever was a case in which it was attempted to charge a person who was not present, as a principal in levying war, in the same manner as if he had been present, in which the count was general, as it is termed. He says that the modern practice is to charge an absentee as present, and the acts of one person as those of another, by relation. I say that it has never been attempted in any case, except that of Sir Nicholas Throgmorton. If there be such a case, let it be shown ; and if such attempts were to be made, I hope they would be discountenanced by every tribunal in this country.

Mr. Wirt insisted that Mr. Wickham was mistaken ; that there is not a single *dictum* against the doctrine for which he contended, and authorities remained yet untouched ; none had been yet produced. He then proceeded. Whenever the conduct of a man amounts to levying war, the indictment need not say any more than that he did levy war. It is alleged that we ought to be more special in our indictment. I refer you to the Apprentices' case, 2 *State Trials*, 581, to show that under the general indictment for levying war, they go in England into the circumstances of the case at large; and 2d, I answer to Mr. Wickham's cases, that neither of them, as before observed, is for levying war. Hewet and Mordaunt were indicted for giving commissions to officers of the exiled king ; and this is not charged as accessorial to any greater act, as levying war. The indictments are restricted to the simple facts which I have stated, and contemplate no ulterior act. How, then, can it be said that those acts are of an accessorial nature, when the sole guilt in the case is consummated by the acts them-

selves which are charged, without borrowing any portion of that guilt from any subsequent occurrence?

The other case, that of Cornish, charges him with promising assistance to the Duke of Monmouth; and here his indictment stops. It does not look to anything else (as Monmouth's invasion) to complete the prisoner's guilt. His guilt is the *promise*, not the *levying of war*. There is nothing, therefore, in these cases to warrant the principle, that when a man is attempted to be implicated, by accessorial acts, in the treason of levying war, those accessorial acts must be detailed. There is nothing in them to prove that the charge of levying war with an armed multitude is insufficient; on the contrary, in the only case in which this point came directly in question before the court, it was unanimously and solemnly declared to be sufficient.

Is it not sufficient in reason as well as in law? They say that Colonel Burr is taken by surprise by the general form of the indictment; nay, that he is therefore persecuted by the government. But how is the fact? Do you believe that Aaron Burr is not sufficiently apprised by this indictment of the charge against him, to prepare for his defence? When it is recollected that he formed a plot for the dissolution of the Union; that his party went from Beaver to Blannerhassett's Island; that he joined them at the mouth of Cumberland; that they were approaching to New Orleans, when his career was terminated by the activity and energy of the constituted authorities; that efforts were made to try him in other states; and that he has been brought hither for trial; will any man in his senses believe that he is not sufficiently informed of the nature of the charge against him? Has he not prepared for his defence? He himself states that he has summoned twenty or thirty witnesses. For what purpose? Is it because he does not understand the charge? He well understands the charge. Let us not then, sir, by these captious exceptions, unsupported either by law or reason, permit ourselves to be turned aside from the inquiry before us. Reason and law concur in showing that there is nothing in Mr. Wickham's second point to obstruct the evidence.

I come now, sir, to the gentleman's third point, in

which he says he cannot possibly fail. It is this: "Because if the prisoner be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no further parol evidence can be let in to charge him, until we show a record of the conviction of the principals in the first degree."

By this I understand the gentleman to advance, in other terms, the common law doctrine, that when a man is rendered a principal in treason, by acts which would make him an accessory in felony, he cannot be tried before the principal in the first degree.

I understand this to be the doctrine of the common law, as established by all the authorities; but when I concede this point, I insist that it can have no effect in favor of the accused, for two reasons: 1st. Because it is the mere creature of the common law.

2d. Because, if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner in this case is of an accessorial nature, or such as would make him an accessory in felony.

First. Because this position is the mere creature of the common law. If it be so, no consequence can be deduced from it. It is sufficient, on this branch of the subject, to take his own declaration that the common law does not exist in this country. If we examine the constitution and the act of Congress, we shall find that this idea of a distinction between principals in the first and second degree depends entirely on the common law. Neither the constitution nor the act of Congress knows any such distinction. *All* who levy war against the United States, whether present or absent — *all* who are leagued in the conspiracy, whether on the spot of the assemblage, or performing some minute and inconsiderable part in it, a thousand miles from the scene of action — incur equally the sentence of the law: they are *all equally* traitors. This scale, therefore, which graduates the guilt of the offenders, and establishes the order of their respective trials, if it ever existed here, is completely abrogated by the highest authorities in this country. The convention which formed the constitution and defined treason, Congress which legislated on that subject, and the supreme judiciary of the country expounding the constitu-

tion and the law, have united in its abrogation. But let us for a moment put the convention, Congress, and judiciary aside, and examine how the case will stand. Still this scale of moral guilt, which Mr. Wickham has given us, *is the creature of the common law*, which, as already observed, he himself, in another branch of his argument, has emphatically told us does not exist in this country. He has stated that the creature presupposes the creator, and that where the creator does not exist, the creature cannot. The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule which is the mere creature of it exist in this country. So that the gentleman has himself furnished the argument which refutes this infallible point of his, on which he has so much relied. But to try this position to its utmost extent, let us not only put aside the constitution and act of Congress and decision of the Supreme Court, but let us admit that the common law does exist here. Still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial, or, in other words, that his acts in relation to this treason are of such a nature as would make him an accessory in felony.

But is this the case? It is a mere *petitio principii*. It is denied that his acts are such as would make him an accessory in felony. I have already, in another branch of this subject, endeavored to show, on the grounds of authority and reason, that a man might be involved in the guilt of treason, as a principal, by being *legally*, though not *actually*, present; that treason occupied a much wider space than felony; that the scale of proximity between the accessory and principal must be extended in proportion to the extent of the theatre of the treason; and that, as the prisoner must be considered as legally present, he could not be an accessory, but a principal. If I have succeeded in this, I have in fact proved that his conduct cannot be deemed accessorial. But an error has taken place from considering the scene of the overt act as the theatre of the treason, from mistaking the overt act for the treason itself, and consequently from referring the conduct of the prisoner to the acts on

the island. The conduct of Aaron Burr has been considered in relation to the overt act on Blannerhassett's Island only; whereas it ought to be considered in connection with the grand design, the deep plot of seizing Orleans, separating the Union, and establishing an independent empire in the west, of which the prisoner was to be the chief. It ought to be recollected that these were his objects, and that the whole western country, from Beaver to Orleans, was the theatre of his treasonable operations. It is by this first reasoning that you are to consider whether he be a principal or an accessory, and not by limiting your inquiries to the circumscribed and narrow spot in the island where the acts charged happened to be performed. Having shown, I think, on the *ground of law*, that the prisoner cannot be considered as an accessory, let me press the inquiry whether on the ground of *reason* he be a principal or an accessory; and remember that his project was to seize New Orleans, separate the Union, and erect an independent empire in the west, of which he was to be the chief. This was the destination of the plot and the conclusion of the drama. Will any man say that Blannerhassett was the principal and Burr but an accessory? Who will believe that Burr, the author and projector of the plot, who raised the forces, who enlisted the men, and who procured the funds for carrying it into execution, was made a cat's paw of? Will any man believe that Burr, who is a soldier, bold, ardent, restless, and aspiring, the great actor whose brain conceived and whose hand brought the plot into operation, that he should sink down into an accessory, and that Blannerhassett should be elevated into a principal? He would startle at once at the thought. Aaron Burr, the contriver of the whole conspiracy, to everybody concerned in it was as the sun to the planets which surround him. Did he not bind them in their respective orbits, and give them their light, their heat, and their motion? Yet he is to be considered an accessory, and Blannerhassett is to be the principal!

Let us put the case between Burr and Blannerhassett. Let us compare the two men, and settle this question of precedence between them. It may save a good deal of troublesome ceremony hereafter.

Who Aaron Burr is we have seen in part already. I will add, that beginning his operations in New York, he associates with him men whose wealth is to supply the necessary funds. Possessed of the main-spring, his personal labor contrives all the machinery. Pervading the continent from New York to New Orleans, he draws into his plan, by every allurement which he can contrive, men of all ranks and descriptions. To youthful ardor he presents danger and glory; to ambition, rank and titles and honors; to avarice, the mines of Mexico. To each person whom he addresses he presents the object adapted to his taste. His recruiting officers are appointed. Men are engaged throughout the continent. Civil life is indeed quiet upon its surface, but in its bosom this man has contrived to deposit the materials which, with the slightest touch of his match, produce an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806 he goes forth for the last time to apply this match. On this occasion he meets with Blannerhassett.

Who is Blannerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shows that war is not the natural element of his mind; if it had been, he never would have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr. Blannerhassett's character, that on his arrival in America, he retired even from the population of the Atlantic states, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and, lo! the desert smiled. Possessing himself of a beautiful island in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery that Shenstone might have envied blooms around him. Music that might have charmed Calypso and her nymphs is his. An extensive library spreads its treasures before him. A philosophical apparatus offers to him all the secrets and mysteries of nature. Peace, tranquillity, and innocence shed their mingled delights around him. And to crown the enchantment of the scene, a wife who is said to be lovely even beyond her sex, and graced with every ac-

complishment that can render it irresistible, had blessed him with her love, and made him the father of several children. The evidence would convince you that this is but a faint picture of the real life. In the midst of all this peace, this innocent simplicity, and this tranquillity, this feast of the mind, this pure banquet of the heart, the destroyer comes; he comes to change this paradise into a hell. Yet the flowers do not wither at his approach. No monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon him. A stranger presents himself. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not difficult. Innocence is ever simple and credulous. Conscious of no design itself, it suspects none in others. It wears no guard before its breast. Every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden when the serpent entered its bowers. The prisoner, in a more engaging form, winding himself into the open and unpractised heart of the unfortunate Blannerhassett, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuses into it the poison of his own ambition. He breathes into it the fire of his own courage; a daring and desperate thirst for glory; an ardor panting for great enterprises, for all the storm and bustle and hurricane of life. In a short time the whole man is changed, and every object of his former delight is relinquished. No more he enjoys the tranquil scene; it has become flat and insipid to his taste. His books are abandoned. His retort and crucible are thrown aside. His shrubbery blooms and breathes its fragrance upon the air in vain; he likes it not. His ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar. Even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unseen and unfelt. Greater

objects have taken possession of his soul. His imagination has been dazzled by visions of diadems, of stars and garters, and titles of nobility. He has been taught to burn with restless emulation at the names of great heroes and conquerors. His enchanted island is destined soon to relapse into a wilderness; and in a few months we find the beautiful and tender partner of his bosom, whom he lately "permitted not the winds of" summer "to visit too roughly," we find her shivering at midnight on the winter banks of the Ohio, and mingling her tears with the torrents, that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness, thus seduced from the paths of innocence and peace, thus confounded in the toils that were deliberately spread for him, and overwhelmed by the mastering spirit and genius of another — this man, thus ruined and undone, and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while *he*, by whom he was thus plunged in misery, is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd, so shocking to the soul, so revolting to reason! Let Aaron Burr, then, not shrink from the high destination which he has courted; and having already ruined Blannerhassett in fortune, character, and happiness forever, let him not attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Upon the whole, sir, reason declares Aaron Burr the principal in this crime, and confirms herein the sentence of the law; and the gentleman, in saying that his offence is of a derivative and accessorial nature, begs the question, and draws his conclusions from what, instead of being conceded, is denied. It is clear, from what has been said, that Burr did not derive his guilt from the men on the island, but imparted his own guilt to them; that he is not an accessory, but a principal; and, therefore, that there is nothing in the objection which demands a record of their conviction before we shall go on with our proof against him.

But suppose you should think otherwise — suppose you

were of opinion, that on principles of law and reason (notwithstanding the seeming injustice and inhumanity of considering him as inferior in guilt to them), Aaron Burr was not a principal, but an accessorial offender in the treason, would you for that reason stop the evidence from going to the jury? Now, to inquire whether the conduct of Aaron Burr make him liable as a principal or accessory, is only arguing in a different shape the whole question whether he have committed an overt act of war or not. The jury are to consult, and decide whether he be a principal offender or not. Whether he be a principal or accessory is a question of *fact*, which they are sworn to decide. The court must judge of the *weight* of evidence before it can say that the accused is either a principal or accessory. Suppose one part of the evidence contradicts another. Is it not judging of the *weight* of evidence to decide whether he be a principal or accessory? If it be not, I know not what judging of the *weight* of evidence is. Nothing is more peculiarly within the exclusive province of the jury than the sufficiency or insufficiency of the evidence.

But the court never says that the evidence is or is not sufficient to prove what it is intended to establish. No court has such right. The course in such cases is to give instructions in a general charge to the jury after all the evidence shall have been heard. Will you, because of your impressions on this subject, from a merely partial view of the evidence, compel the jury also to decide on that necessarily partial view? If you do, do you not thereby divest the jury of their peculiar functions? Their province should not be invaded. The invasion is big with danger and terror. I trust that you will see this subject in the awful light in which it really stands, and that you will suffer the trial to take its natural course.

Mr. Martin has referred you to a number of cases from Cooper and other authors, but they do not prove the position intended. The court in all these cases leaves the jury to decide on the overt act. You will find those cases to amount simply to this: a dialogue between the court and the counsel of the prisoner as to the overt act. The court was required to say whether

the overt act were proved or not. There was no judicial determination. The judge merely told his opinion, but he told the jury at the same time that the decision belonged to them, and not to him.

There is a wide difference between criminal and civil cases; and as it is of much more importance to preserve the trial by jury in the former to protect the lives of the people against unjust persecutions, than in mere civil suits to preserve the rights of property, the constitution has secured that trial in all criminal prosecutions.

Should the court interfere for the purpose of stopping the evidence, and to wrest the cause from the jury in favor of the accused, would there not be a reciprocal right? If it can interfere to save the prisoner, can they not interfere equally against him?—a thing unprecedented in the annals of jurisprudence. Have the counsel on either side a right to call on the other side to state all their evidence before it be introduced, and then to address the court without hearing it, if they t ink they have a better chance before the court than the jury? Has either party a right to substitute the court for the jury, or the jury for the court, at pleasure? to address the court on facts, or the jury on points of law? Such an attempt would not be a greater encroachment on the right of the proper tribunal than the present motion is on the rights of the jury.

I come now to the fourth and last objection to the admission of our evidence. It is this: that no evidence is relevant to connect the prisoner with others, to make him a traitor by relation, until we show an act of treason in those others; and the assemblage on the island was not an act of treason.

The question which the court is here called on to decide is, whether the assemblage on Blannerhassett's Island were an overt act of levying war. As the overt act is compounded of fact and intention, they must yield to us the intention, because we are ready to prove their intentions to be traitorous. Were they not to admit it, we could not be debarred from proving it. They must admit that the individuals who composed the assemblage on Blannerhassett's Island were enlisted by Aaron Burr or his subaltern officers; that they had marched by indi-

viduals to the mouth of Beaver, a place of partial rendezvous; that when collected there, they proceeded to Blannerhassett's Island, another place of rendezvous, where they were to receive an accession of boats, men, provisions, arms, and ammunition, under the command of Blannerhassett himself; that from the island they proceeded by the mouth of Cumberland to Baton Rouge, a place of general rendezvous for the expected forces from the east, and from the states of Virginia, Kentucky, Ohio, and Tennessee; and that at this place he headed them, with a considerable addition of men and arms. They must admit that he attempted the seduction of the officers and men at the several forts and garrisons of the United States, as they passed, which forts and garrisons were too weak to have resisted with effect. They must admit that their destination was New Orleans, where they expected the co-operation of the United States troops and the commander-in-chief. They must admit that New Orleans was to be taken, together with its bank, shipping, and military stores, &c.; that the standard of treason was to be planted in that city, which was to be made the seat of his empire. All the country west of the Alleghany was to be annexed to his empire. All this they must admit, for this and more we are prepared to prove; and they must insist that the assemblage on the island, connected with all these facts, does not amount to treason.

The question, then, is whether, all these things admitted, the assemblage on the island were an overt act of levying war. Here, sir, are we forced most reluctantly to argue to the court, on only a part of the evidence, in presence of the jury, before they have heard the rest of the evidence, which might go a great way to explain or alter its effect. But unpleasant as the question is in this way, we must meet it. What is an open act of levying war? To which we are obliged to answer that it must be decided by the constitution and act of Congress.

Gentlemen on the other side, speaking on this subject, have asked us for battles, bloody battles, hard knocks, the noise of cannon. "Show us your open acts of war," they exclaim. Hard knocks, says one, are things we can all feel and understand. Where was the open deed of war.

this bloody battle, this bloody war? cries another. Nowhere, gentlemen. There was no bloody battle. There was no bloody war. The energy of a despised and traduced government prevented that tragical consequence. In reply to all this blustering and clamor for blood and havoc, let me ask, calmly and temperately, Does our constitution and act of Congress require them? Can treason be committed by nothing short of actual battle? Mr. Wickham, shrinking from a position so bold and indefensible, has said that if there be not *actual* force, there must be at least *potential* force. Such as terror and intimidation struck by the treasonable assemblage. We will examine this idea presently. Let us at this moment recur to the constitutional definition of treason, or to so much thereof as relates to this case. "Treason against the United States shall consist only in levying war against them," not in making war, but in levying it. The whole question then turns on the meaning of that word *levying*. This word, however, the gentlemen on the other side have artfully dropped: as if conscious of its operation against them, they have entirely omitted to use it.

We know that ours is a motley language, variegated and enriched by the plunder of many foreign stores. When we derive a word from the Greek, the Latin, or any other foreign language, living or dead, philologists have always thought it most safe and correct to go to the original language for the purpose of ascertaining the precise meaning of such word. Levy, we are told by all our lexicographers, is a word of French origin. It is proper, therefore, that we should turn to the dictionary of that language to ascertain its true and real meaning; and I believe we shall not find that, when applied to war, it ever means to fight, as the gentlemen on the other side would have us to believe. Boyer's Dictionary is before me, sir, and I am the more encouraged to appeal to him, because in the case of Bollman and Swartwout, your Honor, in estimating the import of this very word, thought it not improper to refer to the authority of Dr. Johnson.

"*Lever*," the verb active, signifies, according to Boyer, "to lift, heave, hold, or raise up." Under the verb, he has no phrase applicable to our purpose; but under

the substantive *levée*, he has several. I will give you them all.

Levée d'un siége, the raising of a siege. *Levée des fruits*, gathering of fruits, crop, harvest.

La levée du Parlement Britannique, the rising or recess of the British Parliament. *Levée* (*collecte de déniers*) a levy-raising, or gathering.

Levée de gens de guerre, levying, levy, or raising of soldiers. *Faire des levées de soldats*, to levy or raise soldiers.

So that, when applied to fruits or taxes, it means gathering as well as raising. When applied to soldiers, it means raising only ; not gathering, assembling, or even bringing them together, but merely raising. Johnson takes both these meanings, as you mentioned in the case of Bollman and Swartwout ; but in the original language, we see that levying, when applied to soldiers, means simply the *raising* them, without anything further. In military matters, levying and raising, if Boyer may be trusted, are synonymous.

But to ascertain still more satisfactorily the meaning of this word *levy*, let us look to the source from which we have borrowed the whole definition of treason, the statute of 25 *Edw. III.* The statute is in Norman French, and, in describing the treason of levying war, uses these words : "*Si home leve de guerre contre nostre seigneur le roy en son royalme.*"

In a subsequent reign, I mean the factious and turbulent reign of Richard II., when the statute of Edward, although unrepealed, was forgotten, lost, and buried under the billows of party rage and vengeance, it became at length necessary for Parliament to interfere and break in pieces the engine of destructive treason ; and in the 21st year of Richard II., a statute was passed which may be considered as a parliamentary construction of that of Edward III. In that statute, the treason of levying war is thus explained : "*Celuy que levy le people, and chevache en counter le roy à fair guerre deins son realme.*" Here the French verb *leve* is the same as that used in the statute of Edward, with an unimportant orthographic variation ; and here it is clearly contradistinguished from the actual war. The *levy* is of *men* and *horses, for the*

purpose of making war; and the levy would have been complete although the purpose had never been executed. I consider, therefore, the statute of Richard as not only adding another authority to Boyer, to prove that the extent of the French verb *lever*, when applied to soldiers, goes no farther than the raising them; but I consider that statute also as a parliamentary exposition or glossary of the phrase *levy de guerre*, in the statute of Edward. In this latter opinion I am supported by 1 *Hale*, 85, who, speaking of the statute of Richard, says, "These four points of treason" (settled by the Parliament of Richard), seem to be included within the statute 25 *Edw. III.*, as to *the matter of them*, with these differences, viz., the forfeiture is extended farther than it was formerly, namely, to the forfeiture of estates tail and uses. 2. Whereas the ancient way of proceeding against commoners was by indictment and trial thereupon by the country, the trial and judgment is here appointed to be in Parliament. 3. But that wherein the principal inconvenience of this act lay, was this, that whereas the statute of Edward III. required an overt act to be laid in the indictment and proved in evidence, this act hath no such provision. These are all the differences that he takes between them. Hence it is clearly the opinion of Hale, that the treason of levying war is *materially* the same in both statutes. For if the statute of Edward required *actual war*, *hard knocks*, *bloody battle*, to constitute treason, while that of Richard made the mere preparation for those purposes treason, would it have escaped such a mind as Hale's, more particularly when he was especially employed in discriminating between the two statutes, and marking the points of difference to the disadvantage of the statute of Richard? If nothing short of actual war will satisfy the statute of Edward, while that of Richard covers so much more ground as to comprehend the first act of recruiting, and to make it the treason, how can the former be said to include the latter? It might with as much propriety be said that a field of battle includes the country or kingdom within which it lies; or that the less includes the greater. Yet of this absurdity Hale hath been guilty, unless it be conceded that the statutes of Richard and of Edward are *materially* the same. If, in conformity to

the opinion of Hale, this point be conceded, then it is indisputably clear and certain that the statute of Richard makes levying of war to consist in the preparations for that war, in the raising of men, horses, &c., for the purpose of making war; so also under the statute of Edward, levying war means the preparations for that war. And if this construction of the statute of Edward be admitted, we have but to remember that our definition of treason is borrowed from this statute, and to ask whether the same words, *levying war*, in the English and American statutes mean the same thing.

Confiding in the candor of this investigation, and the truth of the conclusion to which it has led me, I should myself have thought the mere enlistment of soldiers of itself an overt act of levying war. I should think such enlistment, too, sufficient to satisfy the reason of the statute of Edward, and consequently of our constitution and act of Congress in requiring an overt act to be proven.

Gentlemen may say that the statute of Richard II., by this construction, proves too much for my purpose; that it must be evident that the Parliament were dissatisfied with the generality of the statute of Edward, and intended by that of Richard to restrain that generality and narrow the ground of constructive treason, but that this construction would extend it, and instead of producing the intended salutary effects, would augment the dangers which it was intended to avert.

But the language of the act, which is plain and most explicit, affords a satisfactory answer to this argument. It is exclusive of all possible doubts, by making the act of war consist in visible external preparation. The term *levy* in some lexicons means simply *to raise*; and if this plain sense and most natural meaning were to be adopted, there could then be no *doubt*, the prevention of which is certainly one of the benefits intended by the act. But it appears to me that it is also a reasonable construction; that it is all that reason can require. What is the reason avowed by all the books for requiring proof of an overt act to constitute treason? Every man knows that the moral turpitude consists in the mind and intention. Why, then, do we require proof of an act? It is because we

cannot otherwise discover the intention. It is because the secret intentions of the mind lie beyond the ken of mortal sight. They can be known only to the man himself and to that Being whose eye can pierce the gloom of midnight and the still deeper gloom that shrouds the traitor's heart. To his fellow-men those intentions can be manifested only by some external or overt act. I consider the phrase *overt act* as intended to be in contrast with *secret intention;* but whenever this *secret intention* ripens and breaks out into *an act*, of which the human senses can take cognizance, I consider the reason of the law as being satisfied. We are then relieved from the necessity of prying into and guessing at the secrets of the heart. It is not pretended that any case ever occurred to contradict this idea, until the case which is reported by Ventris, which hath been said by some modern English writer, and pronounced by your Honor, to settle the principle that the mere enlistment of soldiers is not sufficient to constitute the levying of war. Permit me, with the utmost deference and respect for your Honor, to examine that case and see whether it justify a conclusion so broad.

That case, it is to be observed, is adjudged under the statute of 25 *Edw. III.* Now, it requires but to adopt for a moment the idea which I have shown to be sanctioned by Lord Hale, that the statute of Richard explains by a periphrasis the more condensed definition of that of Edward, to perceive the reasoning and whole scope of the case in Ventris. "If a man," says the statute of Edward, "shall levy war against our lord the king *in his realm;*" "or he," says the statute of Richard, "who levies men and horses against the king, to make war in his realm." The levy, then, is a totally different thing from the war. The *levy* is the *preparation;* the *war* is the purpose; but it is "to make war in his realm." Wheresoever, then, the levy is made, the purpose must be to make war in the realm. Hence it is very clear, that though the levying should be within the realm, the statute would not be satisfied unless the purpose also were to make war *within the realm.* It is upon this latter point alone, upon the destination, that the case in Ventris turns, and not upon the scene of enlistment, nor upon the insuf-

ficiency of the fact of enlistment. The case in Ventris is that of Patrick Harding, vol. ii. 315, 316. The charge in the indictment is conspiring the death of the king and queen, William and Mary; and the overt act laid is "levying war by raising divers soldiers and men armed and to be armed (*armatos et armaturos*) *et milites sic ut pœfrertur levatos extra hoc regnum Angliæ misit, et iter secum suscipere procuravit ad sese jungendos aliis hostibus*," &c. The special verdict finds that the prisoner did list, hire, raise, and procure sixteen men, subjects of this kingdom, at the time, &c., and those sixteen men so listed, hired, raised, and procured, *did send out of this kingdom* into the kingdom of France, to assist and aid the French king, &c. "Upon this special verdict found, the lord chief justice, Justice Gregory and Justice Ventris, who were then present at the sessions, conceived some doubt: for they were of opinion that it did not come within the clause of 25 *Edw. III.* of levying war; for that clause is, if a man levy war against our sovereign lord the king *in his realm*, and by the matter found in the special verdict it appears that these men were listed and sent beyond sea to aid the French king." In the original report, the words *in his realm* are printed in Italics, as marking the particular part of the statute on which the opinion rested. But suppose the purposed war had been *within* the realm, is not the implication from the reasoning of the court irresistible, that the enlistment would have been a sufficient overt act of levying? Is it not clear that the court in this case considered the statute of Edward as explained by that of Richard II.? that it distinguished between the levy and the war, and required, according to the express letter of the second statute, that not only the preparation, but the *proposed war*, should be *within* the realm? But it has been said that if the enlistment had been a sufficient overt act of levying war, then war had been levied within the realm. But this is confounding the levy with the war, the means with the end, the preparation with the purpose. It is losing sight of the requisition of the statute, that not the levying merely, but the intended war shall be within the realm. Besides, when the court avows the reason of its opinion, when it declares it to

consist, not in the insufficiency of the fact of preparation, but in the fact that the proposed war was to be out of the *realm*, with what propriety can it be argued that its opinion rested, not on the reason which it does itself avow, but on one which it does not avow, and which it disapproves as far it can do it by implication? If it were immaterial where the war was to be, if the enlistment of men were in itself insufficient as an overt act of levying war, why did not the court take this ground at once, and say that the mere enlistment of men was not an overt act of levying war? The answer is obvious: it was because it considered the statute as requiring that the proposed war should be *within* the realm; whereas the war as found by the jury was intended to be out of the realm; and to my judgment the inference is equally obvious, that if the war had been found to be intended within the realm, the court would have had no doubt that the war had been levied by the enlistment. The case in Ventris, therefore, is so far from warranting the conclusion that the mere enlistment is not a sufficient overt act of levying war, that in my conception it warrants the conclusion that it is a sufficient act. And if the case in Ventris do not justify the doctrine that enlistment is insufficient as an overt act, I defy the gentlemen to produce a case not dependent on that which *does* warrant it.

But let me yield the authority of this case; let me admit it to prove what it has been supposed to prove; still it impairs the etymology of the word *levying* no farther than this, that raising men only is not levying war. How far, then, are we to carry the meaning of the word *levy?* Shall we add the other meaning of the word in the original language, and say that the men must not only be raised, but that they must be brought together or assembled? Be it so: and I contend that neither the courts of this country nor of England have ever required more than a mere assemblage of men with a treasonable intent; whether they be armed or unarmed, whether they use force or not, and whether their numbers be great or small, still the treason is complete.

Arms are not necessary. Whenever the English books appear to require them, it will be found on examination to be in the statement of some hypothetic case *where the*

overt act is to contain within itself evidence of the treasonable intent; but whenever the treasonable intent can be proved by evidence extrinsic of the overt act, arms have never in any case been required. 1 *Hale*, 131, for example, puts these cases, "as where people are assembled in great numbers, armed with weapons offensive and defensive of war. If they march thus armed in a body; if they have chosen commanders or officers; if they march *cum vexillis explicatis*, or with drum, or trumpet, or the like." In all these cases there is not a word of any extraneous evidence of the treasonable intent; but that intent was to be found in the appearance and warlike array of the assemblage itself. Mr. Dallas, whose legal opinions are certainly entitled to very high respect, when he was counsel for John Fries, and was consequently not interested in extending the doctrine of treason, admitted the distinction which I have here taken. In page 100 of *Fries's Trial* he is reported to have said, "As, on the one hand, I grant that the *circumstance of military array is not necessary to an act of treason* if the intention is traitorous, so I insist, on the other hand, that the circumstance of military array will not constitute treason without such intentions." In this he is supported by all the English authorities. I do not refer to his argument as authority, but merely to show the strong impression which this distinction had made on the mind of that gentleman. Lord Hale, who seems more disposed than any other writer or judge to narrow the doctrine of treason, nowhere says that arms are necessary. Speaking of the difficulty of defining what constitutes levying war, he says it is commonly expressed by the words *more guerrino arraiati.* 1 *Hale's Pleas of the Crown*, 131. That is, in treating generally of the subject, or describing the offence in indictments, it is commonly so expressed; and in this light he is understood by *Foster*, 208. So far, indeed, is Lord Hale from requiring military array, that by the strongest implication he declares it unnecessary. In the same page: "Again, the actual assembling of many rioters in great numbers to do unlawful acts, if it be not *modo guerrino* or *specie belli*, as if they have no military arms, nor march or continue in the posture of war, may make a great riot, yet doth not *always* amount

to a levying of war." What is the candid inference from this passage? That *sometimes* such an unarmed assemblage, without the warlike array or the show of war, may amount to a levying of war; for if this be not the inference, the word *always*, used by Lord Hale, has no signification whatsoever. When will such an assemblage amount to levying war? When the intention is manifested by other proof. I affirm that no case can be produced to prove that arms are necessary; that on the contrary, every writer and every judge who has had occasion to mention the subject directly, has declared arms to be unnecessary if the intention can be otherwise proven. "I do not think," says *Foster*, 208, "any great stress can be laid on such distinction (being armed or unarmed). It is true, that in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner, and, where the case would admit of it, the other circumstances of swords, guns, drums, colors, &c., have been added; but I think the merits of the case have never turned singly on any of these circumstances. In the cases of Damaree and Purchase, there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of those circumstances weighed nothing with the court, though the prisoners' counsel insisted much on that matter." He adds what confirms Mr. Dallas's distinction: "The true criterion in all these cases is, *quo animo* did the parties assemble?" not with what they fought, or whether there were hard knocks or bloody battles. East, in his *Crown Law*, 67, collects the authorities together, and proves the truth of Foster's position, that arms or military weapons are unnecessary, and that the intention is the criterion. In the English books, not a single decision, not even an *obiter dictum* of a single judge, can be found to show that military array is necessary where the treasonable intention can be otherwise proved.

I shall now proceed to the authorities of our own country. Judges Chase, Iredell, and Peters expressly declare themselves of Foster's opinion. I beg leave to read a short passage from Judge Chase's charge to the jury on

the trial of Fries. (*Fries's Trial*, 197.) "The court are of opinion that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to levying war, because numbers may supply the want of military weapons, and other instruments may effect the intended mischief. *The legal guilt of levying war may be incurred without the use of military weapons or military array.*"

I think I may now consider it as proven that arms are not necessary to the constitution of treason, either in England or this country. Since, then, *no arms* were necessary to make the assemblage on the island a treasonable assemblage, it is hardly necessary to notice Mr. Wickham's position, that the rifles, which are proven to have been in the hands of the men there, are not necessarily military weapons. I shall only remark that I suspect that there may be yet those living in Great Britain who remember the name of General Morgan, and who can bear witness that a rifle in the hands of a backwoodsman, though even without a bayonet, is a military weapon emphatically, and as formidable a one, too, as a soldier need encounter. They were the best weapons for the purposes for which they were intended, such as scouting parties, picking the enemy's men from the bank of the river, repelling attacks on parties clearing obstructions, &c. But we are told that if arms be not necessary, *force* is necessary to make an assemblage treasonable. Let us inquire if this be so.

Gentlemen contend that marching from places of partial to a place of general rendezvous is not sufficient; there must be *force* to constitute treason. I say that force is not requisite to constitute treason, either by reason or authority. Let us just examine it on the ground of reason. What reason can be assigned for requiring this force? Is it for the purpose of showing what the intention of the assemblage is? If that be the object, there is no necessity for it; for the intention may be shown by other acts.

The intention does not depend on the act. The object is proved by the assemblage itself. If there be an assemblage of men, whose treasonable intentions cannot be proved by any other means whatsoever than an overt

act, then force may be necessary to be proved; but where the intentions of an assemblage can be proved to be treasonable, force is not necessary. The acts of coming together and forming the assemblage in pursuance of the traitorous intention complete the treason. This may be illustrated by the case of Purchase. Neither in the commencement of the riot nor at pulling down any of the houses was he present. He took no part in the outrages of the night till late at the bonfire at Drury Lane. The rioters had destroyed many buildings before he joined them. He had no part in their intentions; for the circumstances excluded the possibility of it. He joined them just at the close of the riot, and he was drunk when he joined them. He encouraged them, when he did join them, to make resistance to the king's guards, and he assaulted their commander. He had taken no part before *that* in those riots and routs. There was no evidence that he had harbored any treasonable intention. There was no way, therefore, to manifest his intention but by some act; and though his guilt was far short of that of the others, yet as he joined them, though at a late period, in resisting the laws, and committed acts of violence himself, a majority of the judges thought he was involved in their guilt. In such cases the intention can only be proved by an external act. If it cannot be proved, it is as if it did not exist. Some act of force is therefore required, because there is no other way of showing the intention but by the indications of acts of force, from which alone the intention is to be inferred. But force is never necessary to be proved when the intention can be proved by independent and distinct proof. But though force be required, the least act of force will suffice; and if we could have proved resistance to General Tupper by two witnesses, we should have proved a sufficient force for the gentlemen. But they would say still there was no act of force. What necessity is there for that? Would it prove anything more than the mere intention? Is not intention otherwise abundantly proven? Would resistance to General Tupper have served to develop either the act or intention? Would it relate to the turpitude of the great design? Or would it prove it to be pure? For what cause can the gentlemen require this force? The

resistance to General Tupper would not have thrown one ray of light on the subject.

Mr. Lee says that hard knocks are things we can all feel; yet it is equally true that an assemblage of men is an object we can all see. True it is, as the gentleman says, that cannons and small arms may be heard; and so may the disclosure of a treasonable plot. At last the overt act which they require is but an appeal to the human senses; and the overt act which we have proven is equally satisfactory to them. Why do they insist on calling in the sense of feeling to the sense of hearing? He may say, if we were to feel it, that we must also taste and smell it. Mr. Wickham, indeed, complains that if you stop him short of actual force, you take away the *locus penitentiæ*. I say, if you do not stop short of it, you take away the motive of repentance; for you offer the traitor victory and triumph, and it is not in *their* arms that we are to expect from him repentance. But was there, sir, no opportunity for repentance in this case? We shall prove that the prisoner was for more than a year brooding over this treason. The ruin and desolation that he was about to bring upon this country must have been often before him. If all love of his country were so far extinguished in his breast that he could not forbear, if the downfall of liberty and the horrors of civil war gave no pang of remorse to his bosom, why, for his own sake, did he not repent? Why did he not remember Cromwell and the treason and fate of Cæsar? Cromwell as bold and daring as himself, and the miserable effects of his successful usurpation; the terrors that haunted and scourged him day and night, and blasted him even amid the splendor of a palace. Cæsar and Cromwell he did not forget; but he remembered them as objects of competition and rivalship, not to detest and abhor, but to envy, admire, and emulate. Such was the kind of remorse which he felt at the idea of drenching his country in blood, and substituting despotism for liberty; such the very promising disposition and temper for repentance which alone he manifested.

Mr. Randolph wishes to know how the line can be drawn between enlisting and striking a blow. The answer is obvious: *At the point of the assemblage*, where

the courts of England and the highest court in this country have concurred in drawing it. A line strong and plain enough to be seen and known is drawn. Does reason, sir, require that you should wait until the blow be struck? If so, adieu to the law of treason, and to the chance of punishment. The aspiring traitor has only to lay his plans, assemble his forces, and strike no blow till he be in such power as to defy resistance. He understands the law of treason. He draws a line of demarcation for the purpose of keeping within the boundary of the law. He projects an enterprise of treason. He enlists men. He directs all the operations essential to its success from one end of the continent to the other; but he keeps himself within the pale of the law. He goes on, continually acquiring accessions of strength, like a snowball on the side of a mountain, till he becomes too large for resistance, and sweeps everything before him. He does everything short of striking a blow. He advances till he gets to New Orleans. He does not hazard the blow till he is completely ready; and when he does strike, it will be absolutely irresistible. Then what becomes of your constitution, your law of Congress, or your courts? He laughs them to scorn! Is this the way to discourage treason? Is it not the best way to excite and promote it? to insure it the most complete success? I conclude, therefore, that reason does not require *force* to constitute treason.

Let me now inquire whether the *law* require it. But before I proceed, I beg leave to premise, that in the several cases on this subject, the word *force* is generally used figuratively, intended to signify the *assembled body*, and not *any deed of violence* actually committed by it. *Force*, or an armed *force* usually spoken of, means, not an *act of violence*, but the *power of doing it*. We frequently call a body of men an armed *force*, because they are capable of using *force*. In this sense it was said that Bonaparte was prepared to make war with the empire of Germany with a *force* of 300,000 men; that he was to enter Italy with a *force* of 70,000 men. Is not this an *armed force* before a blow was struck? Thus, in Vaughan's case, it is stated that he came with an *armed force;* and in the opinion of the presiding judge of the court, in the motion to commit

the prisoner, in March last, we also find this word used in this figurative sense. After saying that it was clear that an intention to commit treason is an offence entirely distinct from the actual commission of that crime, the judge proceeds: "War can only be levied by the employment of *actual force;* troops must be embodied, men must be assembled to levy war." The troops, then, being embodied, the men being assembled, war is thereby levied; force is employed; not that a blow is actually struck, but that there is a body capable of using force, if they please to use it. Sir, as to the demand of actual violence, there is not in Great Britain a single case in which it has been adjudged that force is an indispensable requisite, if the intention be otherwise manifest. All the authorities in that country concur in disclaiming it. They take the distinction between the *bellum levatum* and the *bellum percussum.* Thus (*Foster*, 218): "An assembly armed and arrayed in a warlike manner, for any treasonable purpose, is *bellum levatum*, though not *percussum*." *Listing and marching are sufficient overt acts without coming to a battle or action. East*, vol. i. p. 67, repeats this doctrine, and cites various cases in support of it. *Salkeld* reports, "*there may be levying war without actual fighting.*" Same case, 5 *State Trials*, 37, there were two counts in the indictment against Captain Vaughan, and evidence as to both; and it was explicitly declared by the court that the *bellum percussum* was unnecessary. No English authority requires it. The assemblage and clear evidence of the treasonable design have always been held sufficient. The case in *Kelyng*, page 75, on which the gentleman so much relies to prove the necessity of force, is one of those cases in which the treasonable intent is only manifested by the employment of force and the extent to which it is carried.

It was the case of a riot — a sudden ebullition of popular passion, preceded by no concert, no arrangement, and a case, therefore, in which the intent was unsusceptible of proof, except by the acts of the mob. It was a case, I will add, in which any kind of force would not have been sufficient to make it treason; for if they had stopped with pulling down one bawdy house, or opening one prison to let out a favorite prisoner, that would have been

a riot merely. They continued, however, together and in action for two days, and showed by the extent and nature of the violence which they practised that their intent was general and universal. From such a case surely nothing was to be inferred which will fairly apply to a case so different as that at bar — a case in which there was a previous concert and arrangement, and a case in which the *quo animo*, the criterion of the crime, is susceptible of proof independent of the assemblage.

Let us come now to our own country, and see if our adjudications require actual force. Before I proceed to the examination of Fries's case, let me remind you of an observation of Mr. Randolph's, equally elegant and correct: "An elementary principle resulting from the circumstances of a particular case, and to be found in that case only, should never be applied except to a case parallel in its circumstances." Nothing can be more just than this remark; and it is by violating the rule which it contains that so much jarring, so much irreconcilable discord, so much Babylonian confusion is seen to exist among our cases. With this reflection let us come to the trial of Fries. What were the circumstances of that case? There had been actual violence; it was also a disorganized and disorderly riot, and the reasonings of the British cases applied to its character. But as there had been violence in that case (they had marched, and destroyed General Neville's house), and the judge, in charging the jury, was giving a description adapted to the case at bar, what was more natural than for him to introduce that feature of the case into his description? It will be found that Judge Chase considers the case of Fries as a riot, and reasons upon it in that point of view, applying to it all the English doctrine of riot, where violence, as before remarked, is the only evidence of treasonable intent. But if each *dictum* of the judge in delivering that charge is to be considered as an abstract truth, it will be easy to find in it the clearest indications of his opinion that violence is not necessary. Thus, in page 106: "It is the opinion of the court that any insurrection or rising of any body of people within the United States to attain or effect by *force* or *violence* any object of a great public nature, or of public and general (or national) concern, is a levying of war"

against the United States within the contemplation and construction of the constitution." Here it is not the *actual attainment of the object* by *violence* which is declared to constitute the treason. *It is the rising for that purpose;* and in this supposed case nothing is found but the assemblage and the treasonable purpose or intent. In the succeeding paragraph he repeats the same opinion. In the next he declares military weapons unnecessary. He then proceeds with the particular doctrine of riots, as that the purpose must be general or universal, not private or personal. The intention, he says, is the true criterion of the offence. The next paragraph has been much relied on: "The court are of opinion, if a body of people meditate and conspire an insurrection to resist or oppose any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by *force*, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime, whether by one hundred or one thousand persons is wholly immaterial."

I understand the word *force* here to be used in its figurative sense; that it is used as contrasted with the conspiracy or meditation of the treason; that it is used to signify the body assembled for the purpose of carrying that conspiracy into effect. Hence it is that in the concluding member of the paragraph he speaks of the number assembled, or what he calls the *quantum of the force*, declaring its numbers to be immaterial, whether one hundred or one thousand. He maintains the same idea in the next paragraph, which he concludes with these words: "But *it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying war.*" He states his opinion to be in substance the same with the opinion of the Circuit Court in 1795, in the case of Vigol and Mitchell. Now, in the case of Vigol, 2 *Dallas*, 347, the court gave no absolute opinion. The opinion is confined to the circumstances of that case, in which the judge states there were acts of violence and devastation. But in the case of Mitchell, *idem*, 356, Judge Patterson, commenting on the circumstances of its

not being sufficiently proven that the prisoner was at General Neville's house, where the violence was committed, speaks thus: "He is proved by a competent number of witnesses to have been at Couch's Fort. At Couch's Fort the conspiracy was formed for attacking General Neville's house; and the prisoner was actually passed on the march thither." Now, in *Foster*, 213, the very act of marching is considered as carrying the traitorous intent into effect. In a subsequent part of his opinion, the judge, speaking of the conspicuous figure which the prisoner had made, uses these explicit words: "His attendance armed at Braddock's Field *would of itself amount to treason, if his design was treasonable.*" So that if Judge Chase's opinion be, as he professes, substantially the same with this of Judge Patterson's, then a deed of violence is not necessary, but the assembly and treasonable intent are enough. Judge Chase sums up his opinion in these words: "If from a careful examination of the evidence you shall be convinced that the real object and intent of the people assembled at Bethlehem was of a public nature (which it certainly was, if they assembled with intent to prevent the execution of both of the above-mentioned acts of Congress, or either of them), it must then be proved to your satisfaction that the prisoner at the bar incited, encouraged, provided, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by the means of intimidation and violence, the execution of both the above-mentioned acts of Congress, or either of them; and that some force was used by some of the people assembled at Bethlehem." But for these concluding words, the opinion of the judge would have rested merely in requiring what Mr. Wickham calls *potential force.* The last words may be well accounted for from the particular circumstances of this case, in which there was actual violence; and I will venture to affirm that it is the only case in which a deed of violence ever was declared necessary, when the assemblage and the treasonable intent could both be made out by proof independent of any such deed. If there be another, let it be shown. If this case stand alone, why will you make this principle an abstract and general one, since, in the language of Mr. Randolph, it

results from the circumstances of this particular case, and can be found in this case only. Judge Chase was not sitting in the Supreme Court when he gave that opinion. It was an inferior court; and if there should occur another case in the Supreme Court in which the question will be, how far *actual* force is necessary to constitute the crime of treason when there is proof of a traitorous intention and of an assemblage, I cannot doubt, from any part of the decision in Bollman and Swartwout, that it will decide that force is not a necessary ingredient in the composition of treason in such a case.

I have shown that in England the distinction is clearly settled between the *bellum levatum* and the *bellum percussum;* and that there war may be levied, although no blow be struck. I will now show, that by the authority of a court of this country superior to that in which Judge Chase sat, it has been in substance declared, again and again, that war may be levied without battle; that the assemblage with a treasonable intent completes the crime of levying war. You will know, sir, that I am referring to the opinion of the Supreme Court in the case of Bollman and Swartwout. In that case the court, after making a preliminary statement, proceeded in the declaration of its opinion, thus: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." "To constitute that specific crime, for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Is there any requisition of force here? Is it said that the conspiracy must be brought into operation by the assemblage of men for a purpose treasonable in itself, and by *deeds of force* and *violence*, or the fact of levying war cannot have been committed? No, sir, *it is the*

assemblage of men for a purpose treasonable in itself, which alone is declared sufficient to make the fact of levying war; and this reasoning is strengthened by recollecting that there was no force in the case of Bollman and Swartwout. "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, *if war be actually levied*, that is, *if a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose*, all those who perform any part, however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assemblage of men *for the treasonable purpose* to constitute a levying of war."

Here force is mentioned; but how is it mentioned? Merely as the ultimate purpose of the assemblage; the means by which they intend to execute their treasonable design. So in the assemblage on the island, their object was the seizure of Orleans. They intended to effect that purpose by force. There was, then, a body of men actually assembled; and the purpose which brought them together, and which they were going to effect by force, was a treasonable purpose. Again: "To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design."

Here an actual assemblage of men for the purpose of executing a treasonable design is declared to *complete* the crime of levying war: not a word of force or deeds of violence, yet the crime is *completed*. The court professes to be enumerating the ingredients which taken together would make this crime, and concludes this enumeration by stating that *that* would *complete* it. Yet it is pretended by the gentlemen on the other side that the great ingredient of force and violence not enumerated by the court is necessary to its completion. Is it to be believed that the judges would again and again have declared that an assemblage of men, with a traitorous intention, in a case where there was no actual force, would constitute and complete treason, and not once mention the necessity of actual force, if they thought it essential to the consummation of treason?

"In the case now before the court, a design to overturn the government of the United States in New Orleans by force would unquestionably have been a design, which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war."

Here, again, the court declares that the assemblage for the treasonable purpose would amount to levying war. Well, if that would amount to levying war, it required nothing else to make it amount to it. Yet gentlemen persist in saying it did require something else, as deeds of violence, to make the assemblage an act of levying war; or what is bolder still, that these deeds of violence were required by the opinion of that court. In other words, that while the court was perpetually and uniformly saying one thing, it as uniformly meant another and a totally different one. Let us proceed with the opinion: "If the enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any other territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the *assemblage of a body of men to effect it* would be levying war against the United States."

"But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an *open assemblage of men* for that purpose, previous to the arrest of the prisoner, in order to *consummate* the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling."

We have been told that the assemblage with the treasonable intent would amount to levying war; would complete the crime of levying war: here, in variant language, but language equally as strong, if not stronger, we are told, that if the treasonable intent be carried into execution — How? by deeds of violence and force? No, but

by an open assemblage of men for that treasonable purpose, this crime is *consummated.* Not that by such assemblage the crime is in an incipient stage; not that it is advancing to maturity, but that it is *consummated.* To remove all possibility of doubt, the court then begins to consider the subject analytically: "The prisoner stated that Colonel Burr, with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of seven thousand men from the State of New York and the western states and territories with a view to carry an expedition to the Mexican provinces."

"That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men *without assembling* them is not levying war. The question, then, is, Whether this evidence prove Colonel Burr to have advanced so far in levying an army as *actually to have assembled them.*" Here, again, it is clear that if the case have gone so far as that the men have *been assembled,* the crime in the opinion of the court is complete.

Proceeding with the analysis, the court says, "*It cannot be necessary that the whole army should be assembled,* and that the various parts which are to compose it should have combined; but it is *necessary there should be an actual assemblage;* and therefore this evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. *The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.*"

"The particular words used by Mr. Swartwout are, that Colonel Burr was levying an armed body of seven thousand men. If the term *levying* in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or en-

gaging them in his service, the fact would not amount to levying war.

"It is, therefore, the opinion of a majority of the court that in the case of Samuel Swartwout, there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason."

After language so clear and unequivocal, I should feel that I was insulting the understanding of the court if I were to press the inquiry, whether deeds of violence be necessary to constitute the treason of levying war against the United States. So far from deeds of violence the court does not even require the assemblage of the whole force; but expressly declares that the mere marching of individuals from a place of partial to a place of general rendezvous is such an assemblage as would amount to levying war. Our court in this case has clearly maintained the line of demarcation acknowledged by the British courts between the *bellum levatum* and the *bellum percussum.*

Is there any man in North America capable of understanding the subject, who, after reading this opinion, can believe that the court thought more than an assemblage with a traitorous intention necessary to constitute treason? Can any man believe that the court, after these repeated and explicit definitions, could think force necessary? If the court had thought *force* essential to the constitution of treason, can it be believed, that with its powers of discrimination, it would have omitted to mention so important an ingredient in the composition of treason? I should have supposed, that after such an investigation of this subject, the analysis of treason would have been complete; and that after the Supreme Court had so often, so clearly, and (though in variant expressions), so explicitly stated that an assemblage of men with a treasonable design constituted and completed the crime of treason, nothing more would be deemed necessary. But the gentleman has taken a distinction between *actual* and *potential* force; and he says that if the former be not necessary, the latter at least is; and by *potential* force he means intimidation. Let us examine whether this be a sound distinction as applied to this case. To

illustrate his meaning still more distinctly, he puts this case: Suppose a body of men assemble in the country in great numbers, and march into this town for the purpose of attacking the capitol and seizing the public arms. The people of Richmond, intimidated by them, because in such numbers, withdraw and make no resistance. This, he says, is *potential* force. The force here meant is applied not to the body, but the mind. This force in that case is complete for the purpose which the traitors have in view.

To the requisition of this force I have two answers to make: First, that neither the law of England nor the Supreme Court of this country requires any such thing. I need not repeat the authorities upon this subject. The passages which I have recently read from the decision of the Supreme Court are fresh upon your memory; and you know that they do not even insinuate such an idea, but repeatedly declare the crime to be completed and consummated by the bare assemblage for a treasonable purpose.

My second answer to the requisition of force is, that if it be necessary, and if I understand what is meant by it, it does exist in the case at bar. Let us examine what is meant by *potential* force. In the case put by the gentleman of a multitude marching to attack the capitol, and the people of the town standing aloof in apprehension and alarm, what is the force which operates? Not hard knocks confessedly, but the excitement of fear and apprehension. Suppose, however, that the towns-people, instead of being frightened into submission, had been excited by apprehensions for their capitol and themselves to take arms for their defence: the same affection of the mind would still be in operation, though in a different degree. It would still be apprehension for their safety which would urge them to their defence. In this case the approaching body, although not successful, has had its effect. It has compelled the town to arm in opposition to it. Would not this be completely the exertion of potential force Would not the town have been forced to its defence? And as the force which produced that effect was not *actual*, must it not have been *potential?* If the town in this case, thus compelled to arm in its defence, should march out and rout the approaching body without a blow

on either side, and seize and destroy their baggage wagons, I ask whether this approaching body, formed of citizens, would not be traitors? My reason and judgment tell me, that the force then acting on the inhabitants of this town, the alarm which made them fly to arms, is *potential force;* and that those who had excited this species of force upon the town would be traitors even according to Mr. Wickham's conception.

Apply this doctrine to the case before the court. I ask whether the assemblage on Blannerhassett's Island did not exert this species of potential force on the surrounding country? Did not Tyler and his party, and those with them on the island, put that country into a state of perfect consternation? What was it that urged the state government of Ohio to send a body of men to take this party and seize their boats? What induced the legislature of that state to deliberate with closed doors? Was it not a well-founded alarm and apprehension of the objects of this assemblage? What was it that caused the militia of Wood County to be put in motion and marched to the island? The same mental affection, the same *potential* force, the same alarm and apprehension which had acted on the government of Ohio. What was it when this assemblage fled from the island and advanced down the river, gathering, like a snow-ball on the side of a mountain, magnitude and momentum as it rolled along? What was it that threw New Orleans into dismay and consternation, and produced the movement of the American army in that quarter for its defence? This was the very quarter where the exertion of potential force was most expected. Sir, this terror arose from the designs of the prisoner and his party; designs which we shall prove upon them if permitted. It was fear acting on the minds of the people. They were alarmed and afraid of the division of the country, the erection of an independent empire, and the establishment of despotism. Here actually was potential force; intimidation from visible and apprehended numbers producing the same effect as real force. And contemptible in point of numbers as the party was, the United States had not a garrison on the river, nor even in New Orleans, in the then temper of the city, capable of resisting the designs of the pris-

oner. All this we are prepared to establish if the evidence shall go on.

Upon the whole, sir, if potential force be required, we are ready to prove in this case that the party by acting on the apprehensions and fears of the people produced the same effects that the exertion of actual force could have done. And I believe it is by this time perfectly clear that the assemblage on the island had every character and property which either law or reason require to constitute an overt act of levying war.

But suppose I am wrong in all this argument, and that the court should be of opinion that *actual force* is necessary to constitute an overt act of treason, and that the assemblage on the island was insufficient for that purpose; will you arrest the evidence? To whom does it belong to decide whether there have been an overt act or not? An application of this sort was made once before. What did you yourself decide then upon this subject? "*Levying of war is a fact which must be decided by a jury.* The court may give general instructions on this as on any other question brought before it, but the jury must decide upon it as compounded of fact and law. Two assemblages of men not unlike in appearance possibly may be, the one treasonable, the other innocent. If, therefore, the fact exhibited to the court and jury should in the opinion of the court not amount to the act of levying war, the court could not stop the prosecution, but must permit the counsel for the United States to proceed to show the intention of the fact, in order to enable the jury to decide upon the fact coupled with the intention."

And now you are called upon again to stop the proceedings, because the assemblage on the island committed no act of force, and was not an act of treason. And would you stop the trial because you should think that an overt act is not proved? Is it not the exclusive province of the jury to decide whether an overt act of levying war have been committed? Counsel may address to the court what motion they may please, but the jury have a right to decide for themselves. This shows the absolute inutility of deciding on this motion now. Will you undertake to decide, on one half or one fourth of the evidence,

that there has been no overt act committed? The overt act is a *fact* compounded of intention and act, and yet you are called on to take the decision out of their hands! In strict unison with the opinion of the court, just referred to, is the English law: 1 *Hale's Pleas of the Crown*, and 1 *East*, 67 (which see before). This court, then, having itself decided that the question, whether there have been an overt act or not, belongs essentially to the jury, it is strange that the prisoner should persist in pressing it on the court. What does he mean by calling on the court to decide on the fact of levying war? Have you the power, sir? I should like to know where the authority can be found to prove that you have it. And suppose the court thinks it has this power, and should exert it, what will be the consequences? Will it not take away from the jury their acknowledged right of deciding on facts? But the anxious perseverance of the prisoner in this course certainly implies a reflection either on the jury or the court; it implies either that the jury will not do him justice, or that the court will do him more than justice. If he believed the jury would do him justice, and wished nothing more, he would be content to leave his case to them. If he believe they would not do him justice, and he therefore tries to force his cause before the court, whether it will or no, I may truly say that he exhibits a phenomenon unprecedented upon this earth: a man flying from a jury of his peers to take refuge under the wings of the court! Sir, I can never think so illy of my countrymen as to believe that innocence need fly from them; nor will my respect for the court permit me for a moment to apprehend that it will invade the peculiar and acknowledged province of the jury. This court well knows that my respect for its members, as private gentlemen and officially, is too great to apprehend that remarks of a general nature will be applied to them. But if at this period, when the bench is so distinguished by intellectual power and superior illumination, a precedent be set, by which the great fact in trial for life and death shall be wrested from the jury and decided by the bench, what use may not be made of it hereafter? In the fluctuations of party, in the bitterness of rancor and political animosity, the judges may lead juries to one side

or the other, as they may think proper. They may dictate as to the existence of an overt act, and thus decide the fate of a prisoner. If a judge sitting on the bench shall decide on facts as well as law in a prosecution for treason, he may sacrifice or rescue whom he pleases. If he be a *political* partisan, he may save his friends from merited punishment, or blast his foes unjustly. If judges in future times, not having the feelings of humanity and patriotism which they have in these days, but animated by the zeal and factious spirit of party, to promote the views of party, shall have the power now proposed to be exercised, what will be the posture and fate of this country then? If you establish this precedent, some tyrant *Bromley* or some ruffian *Jeffreys* may mount the bench. Can the soul look forward without horror to the dark and bloody deeds which he might perpetrate, armed with such a precedent as you are now called on to set? But you will not set it, sir. You will not bring your country to see an hour so fearful and perilous as that which shall witness the ruin of the trial by jury. I shudder to reflect what might be the consequences of such an hour. You will cast your eyes into futurity, and foreseeing the calamities that must result from so dangerous an example, will avoid it. You will be satisfied that neither reason nor the laws of England or of this country support the doctrine, that you have the power to prevent this jury from proceeding in their inquiry, merely because your mind is satisfied that the overt act is not proved.

All the distinctions which Mr. Wickham and Mr. Randolph have taken have gone on the dangers of constructive treason. All their apprehensions on this subject seem to me to be perfectly visionary. They appear to result from this mistake: They look at the dangers of constructive treason under the common law, anterior to the statute of Edward. They look into the terrors expressed by Hale, when he enumerates the many various kinds of treason, before that statute limited the number. The meaning of constructive treason is generally misconceived. It is well explained in 1 *East's Crown Law*, 72: "*Constructive levying of war* is in truth more directed against the *government* than the *person* of the king, though in legal construction it is a levying of war against

the king himself. This is when an insurrection is raised to reform some national grievance, to alter the established laws or religion, to punish magistrates, to introduce innovations of a public concern, to obstruct the execution of some general law by an armed force, *or for any other purpose which usurps the government in matters of a public and general concern.*" It is, therefore, true, as laid down by Mr. Rawle, in *Fries's Trial*, 161, "that what in England is called *constructive levying of war*, in this country must be called direct levying of war." Although this seems not to be assented to by Judge Tucker (4 *Tucker's Blackstone*, *appendix*, 13, 14), possibly because he did not examine that point as thoroughly as he did the doctrine of treason generally.

Before that statute passed, the dangers resulting from arbitrary constructions of treason were great and grievous, and the complaints against them as vehement as they were just. Levying war in England against the king or his government, the "*crimen læsæ majestatis*," consists of direct and express levying of war against the king's *natural* person; constructive levying it against his government or his authority in his *political* person. In America the crime is defined in the constitution. It consists in levying war against the United States. In England it consists in an opposition to the king's authority or prerogative. Here it is against the constitution and government. In England, when it is intended against the life of the prince, it may consist in mere imagination, in the mere design or intent of the mind. But in this country the offence is against the government, the *political* person only; and it is *actual* war. As it is against the government, not against a natural person, it may be said to be constructive. But constructive interpretations of treason, which produced so much terror and alarm formerly in England, and against the abuses of which gentlemen have declaimed so pathetically, cannot take place in this country. They are expressly excluded by the constitution. Upon the whole, I contend that the meeting on Blannerhassett's Island, the intention of which is proven to be traitorous, was an act of treason; that the assemblage with such intention was sufficient for that purpose. And if it were not sufficient, this court cannot

stop the proceedings. The jury must proceed with the inquiry.

I have finished what I had to say. I beg pardon for consuming the time of the court so long. I thank it for its patient and polite attention. I am too much exhausted to recapitulate, and to such a court as this is I am sure it is unnecessary.

Mr. Botts then addressed the court: I cannot promise you, sir, a speech manufactured out of tropes and figures. Instead of the magnificent image of Bonaparte ascending to quench the stars, so fitted for the dry law question in debate, my humble efforts will be altogether below the clouds. Instead of the introduction of a sleeping Venus, with all the luxury of voluptuous and wanton nakedness to charm the reason through the refined medium of sensuality, and to convince us that the law of treason is with the prosecution by leading our imaginations to the fascinating richness and symmetry of a heaving bosom and luscious waist, I am compelled to plod heavily and meekly on through the dull doctrines of Hale and Foster. So far, though, from reproving the gentleman's excitement of the boiling blood of such of us as are in the heyday of youth, without the previous caution of clearing the hall of those whose once panting desires have been chilled by age, and upon whom the forced ecstasy sat unnaturally and uneasily, I only lament my utter incapacity to elicit topics of legal science by an imitation of so novel and tempting an example. Nothing but the impossibility of success would prevent me also from grasping at the fame and glory on this grave occasion, and at this time of pleasure, of enriching the leering lasciviousness of a like bewildering thought, to transport anew the old and the young.

The first proposition which I shall endeavor to establish in support of our motion is, that the acts proved to have taken place on the island were not in themselves acts of war, and no intention could make them acts of war. A bare statement of the facts will prove this to be true.

About thirty men went upon the island, and remained there for two or three days. They had some arms with ammunition. They watched their property at the boats. They prepared provisions for descending the river; and

at a place contiguous to the island they killed some squirrels. As notable a circumstance as any in this overt act is, that they had what one of the witnesses calls a *watchword. All* but Blannerhassett and Tyler were *confessedly* ignorant of the plan. They got alarmed at the report of a mob, and fled secretly in the night, after Tyler had declared his purpose not to resist the constituted authorities. It may be considered as proved, though only by one witness (Allbright), that they had six or seven guns, but his evidence is much to be suspected. As to their presenting guns at General Tupper, it ought not to be believed. If believed, it was only an act of violence to a private individual, or, at most, it was but resistance to an officer. But Tupper was not in office. He was out of the State of Ohio; and the instant he left it his authority ended. It is conceded by the gentlemen that violence to him, when thus without authority, could not be an act of a treasonable nature. Even if it had been in Ohio, it would have been war against Ohio only, if it were war at all, which is by no means admitted. Allbright is but a single witness, and two are required to prove the overt act. Another witness was introduced, probably from an apprehension that this witness had committed himself on so many points that he would be entirely disregarded; but the other witness did not confirm his testimony. I will not at *this* time enumerate the declarations which he made with his own contradictions, and the circumstances which show that he is not to be depended on. The proposition on the other side is, that the acts which I have enumerated on Blannerhassett's Island were *overt acts of war.* Those acts were intended first against the people of Wood County; or, secondly, against New Orleans. First: It was, I will suppose, against Wood County. The boats, the oars, the provisions for a long journey, the after descent, were circumstances calculated for overt acts of levying war against Wood County! because these boats, oars, provisions, and descent were proper acts of war against the people of Wood County!

But, sir, the party was armed, and this shows that they were in expectation that the people of Wood County would attack them. I apprehend that the people of

Wood meditated war on the people of the island, not that the islanders meditated war against the militia of Wood. And accordingly we find that the people of the island fled silently in the night from those of Wood. And because they *fled*, it seems they were *guilty of acts of war!* But if the war were not against Wood County, it was against New Orleans, which was only two thousand two hundred miles distant!

Here let us consider Mr. Hay's definition of a treasonable assemblage. It is a general and abstract definition. "An assemblage of men convened for the purpose of effecting by force a treasonable design, which force is meant to be employed before their dispersion." But the arguments of the gentlemen present a very different definition. From the arguments of the gentleman in the prosecution, who spoke on Monday and to-day, and from the principles of law presented to the jury by the attorney for the United States, in his opening speech, I have collected the following definition of treason: "An assemblage of *three* or more persons without arms, without a treasonable thought, unorganized, with peace and patriotism in their hearts, under a promise from a fourth person then three thousand miles off, that he will divulge his plan to them after they go nine hundred miles on a fixed route, *will* without anything more be an overt act of war against the United States, in case a wretch can be picked up to swear that twenty years ago, *that* fourth person had said he meant to seize by force a place two thousand two hundred miles distant from the assemblage, and without the limits of the United States. And this will be war, although that fourth person should have declared a thousand times since the period referred to by the informer, that his plan was honorable and lawful; and although a civil war from that party should *confessedly* have been *prevented* by the seizure of the leader before his plan was disclosed. And any one who may at the distance of other three thousand miles, for example, give directions by letter to the three assembled as to the safest mode of descending the river would be *leviers* of war also."

"But if ten thousand men, all armed and disciplined, with treasonable purposes meet, march in a body to a point one mile distant from the intended scene of war,

and then disperse, that is, disunite and go in different tracks towards that intended scene, the first meeting and marching will not be war."

I have gathered the different parts, the limbs, the trunk, and the head of this monster as they were scattered by the prosecutors, and done no more than put them together. To it the three gentlemen are fathers in coparceny. By dissecting it, the court will see it in all its deformities; and I should be guilty of unpardonable plagiarism in taking to myself any of the credit attaching to its origin.

The definition begins with "an assemblage of three or four men." In Mr. Hay's definition of treason, contained in his own words, "an assemblage of men convened," &c. (vol. i., page 436). Nothing has been said about the *number* required to form an assemblage, but the other gentlemen have stated that the number was of no importance. In *law*, three or more will form an assemblage (see the definitions of riots, routs, and unlawful assemblies), and of course such number will satisfy this claim of the definition. The smallest number will fit Mr. Hay's proposition: "*The assemblage may be without arms.*" Mr. Hay said, "On the principles of common sense, then, it is not necessary that they should have arms to consummate the overt act of treason."

These three persons may be without a treasonable thought, unorganized, and with peace and patriotism in their hearts. Mr. Hay, speaking of the conduct of the accused, said, "All were told that the design was just and honorable, known and approved by the government, and in which the co-operation of the army was to be expected; that it was one which would lead to great fortunes, and that it would be developed as soon as the proper time for the disclosure arrived. *The time, however, never did arrive. At Blannerhassett's Island it was not the time; and when at the mouth of Cumberland River, some enterprising men, but who were not disposed to violate the laws of their country, were solicitous to understand this project, they were told that the time had not yet come. Ignorant people were led away from their homes, under an expectation that they would be informed of the whole project. The information was promised, but*

never imparted." So that, according to Mr. Hay's own explicit admission, the assemblage on the island were ignorant of the plan, and not disposed to violate the laws of their country. They were without a treasonable thought; and it is to be presumed that they had peace and patriotism in their hearts. They could not be organized, because they were not even informed of the plan. So that Colonel Burr, though not on the island, is presumed by gentlemen's construction to be there present under the constitution; and that he might derive the guilt of treason from three persons on the island who were perfectly innocent and unconscious of any crime; and thus men who have no treasonable purpose in view communicate guilt to other men at a great distance. This little assembly is to be under the promise of a fourth person three thousand miles off, that he will develop his plan when they get nine hundred miles on. Colonel Burr was only between two and three hundred miles off. But Mr. Hay has expressly said that a man may levy war at the distance of three thousand miles. The mouth of Cumberland, where, by promise, the plan was to be imparted, is about nine hundred miles from the place which the men on the island came from.

"*There must be a wretch picked up to swear that twenty years ago the accused said he meant to seize by force a place two thousand two hundred miles distant from the assemblage, and without the limits of the United States.*" One witness will do for this purpose; two are not necessary. The declarations attempted to be proved on Colonel Burr are various, but no two witnesses can prove the same declaration. These declarations were made near two years ago, and there is no limitation to bar their operation. Twenty or more years may be retrospected for mere words to charge him. New Orleans is by water two thousand two hundred miles from the island, *and out of the limits of the United States.* And we are to understand *that war was made on New Orleans by the assemblage when they were on Blannerhassett's Island,* and *that this war was against the United States!*

No act of force is necessary to be performed by the assemblage or their patron in order to perfect the war. But such an assemblage, with such an intent proved by any

former declarations of the *fourth* person, will make the war. Mr. Hay says, "I contend that it is not necessary to have waged battle, or to have committed any act of violence;" and you will recollect how laboriously he argued against the necessary use of force.

Such an innocent assemblage will be war, although that fourth person shall have declared a thousand times since the period referred to by the informer that his plan was honorable and lawful.

Colonel Burr's latest declarations were to Commodore Truxtun. They imported a purpose to carry a military expedition into Mexico only in the event of a war with Spain. If one such declaration would not do away the effects of declarations of a different nature six months before, a thousand such after-declarations would not alter the case. *The assemblage would be war although that war should confessedly have been prevented.*

Mr. Hay says, "If General Wilkinson had acted as some have represented — if, instead of performing the part of a patriot, he had played the character of a traitor, what would have been the consequence? The people of the United States would have had a civil war waging in the west?" The necessary implication *is* that there was no civil war in the west. There could be no war waged by Colonel Burr but a *civil* war. Treason cannot consist in any but a civil war. Then there *was war*, when there was confessedly no war; and it happened, though it was prevented!

But any fifth person another distance of three thousand miles off may, by giving directions by letter to the assembly of three as to the best mode of descending the river, become leviers of war.

Mr. Hay says, "If war be actually levied, all those who perform any part, however *minute* or however *remote* from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." What the general conspiracy *was* in this instance, when the people of the island did not know even the plan, is not explained. *None can be traitors but leviers of war.*

The last paragraph of the definition grows out of the concluding member of Mr. Hay's general definition, making it indispensably necessary that the force should be

intended to be employed before that dispersion. Now, people knowing that no assemblage or marching can be war, if the assembly shall *intend to disperse* before they make battle, may collect to the number of ten thousand men on Blannerhassett's Island, organize, and plan to march in a body to within one mile of New Orleans, then separate, and go on different tracks the other mile; and this separation will make the meeting, organizing, and marching no war.

But suppose this case really to happen, that ten thousand men should assemble on Blannerhassett's Island, and should have got down within a mile of New Orleans, and having heard of this excellent definition of treason by Mr. Hay, should disperse, disunite, and then should all, by different routes, proceed to New Orleans, and effect their purpose. This would not be an act of war, for it does not come within Mr. Hay's definition. Well, *now* people know how to commit treason, and how to avoid its punishment. This excellent definition of Mr. Hay's shows them how to commit the crime without incurring the punishment. They may meet as often as they wish in the course of their journey. If they only *disperse* before, their last meeting will never be war.

I will suppose that fourth person to be now on his trial for treason. The following case — that is, prosecution and defence — may be expected from the parties. The prisoner would argue that three persons cannot make war against six millions. It is true that the books, Foster, Hale, &c., say that numbers are not important, and that it matters not whether there be one hundred or one thousand. Yet in all the cases laid down in all the books no instance can be found in which less than one hundred have levied war. He would say that in England pulling down conventicles or bawdy houses was treason, which did not require as many as to levy war against the United States. The answer of the prosecutor to this argument would be, that three men, being enough to make an assemblage, would do to make war; that *building boats* is *making war* here; that the number one hundred was not put by way of example.

But the prisoner might say that these persons had no arms, and if they had guns, they were not long enough to

shoot all the way from the island to New Orleans; that numbers and other offensive weapons were necessary to supply the want of arms; for which he might refer to the authority of *Foster*, 208. The reply would be, that no arms were necessary; that they might make war with their fingers. The prisoner might urge that persons in this country have a right to carry arms, and refer to the authority of Judge Tucker, &c., that it was also conformable to usage for people going down the river to kill ducks and other such game. The prosecutor would answer, that arms were not necessary; that they had three or four guns, a little powder, and shot, even, to kill fowls, and ten or twelve boats; that it was a most bloody war indeed; that without arms it would be war, but with these arms it was a most dangerous war against the United States.

The prisoner would urge further that these three men were patriots like yourselves. "My plan, if I had one," he would say, "was not disclosed to them. If I harbored treasonable intentions, their assembling would not conduce to the levying of war until my purpose were disclosed to them, and they agreed to it. They would be the first to seize me for trial, if I were to propose a treasonable plan to them." I cannot tell what answer the prosecutor would make to this. The prisoner then would argue that there was no act of war committed by these three persons. The answer must be, that they had fled secretly under an apprehension that the militia of Wood County would make war upon them, or burn the house of one of them; and that was an overt act of war. And said the worthy gentleman yesterday, "Suppose we could prove that Aaron Burr sent word to them, '*Fly, or the Philistines will be upon you.*'" All this may be true, but it affords no proof that these three people on the island made war on New Orleans or the United States. If it does, then it shows, that if I run away and hide to avoid a beating, I am guilty, and may be convicted of assault and battery! This is a new and extraordinary way of making war. I do not know whether the worthy gentlemen on the other side ought not to send a *recipe* for making this new kind of war to that country to which he alluded in his speech in opening this cause, to King George III. He told us with all the ingenuity which characterizes

him "that war might be made at the distance of three thousand miles as well as at a short distance;" that armies and fleets from the British shores might make war upon us Americans in our own country. What a blessing to the world the discovery of such a peaceful war would be! How it would work his majesty's brain to comprehend it! He would be as much puzzled as he was to find out how the apple got into the dumpling!

But the prisoner would then go on to urge that you yourselves had acknowledged that General Wilkinson had prevented the war from taking place. When you charge him with having made *actual* war, he might retort that you contradicted your own arguments, because the admission of its having been prevented is inconsistent with the charge of its having actually taken place. Gentlemen might say that it was a *civil* war. What can be a civil war but a treasonable war? To this and some other questions by the accused, the prosecutor must keep the most profound silence.

The next thing to be done is to prove the intention to make the war. I think it must have struck you that such an overt act as fits the definition and principles which Mr. Hay has furnished would be common to all men alive. There would be no difficulty in proving an overt act on any human being who has ever been in an assemblage; and who has not been in an assemblage of men? After adducing proof of the prisoner having been in such an assembly, all that remains for the prosecutor to prove is a criminal intention. The war, according to this construction, consists in the heart, not in the act. Witnesses may be called to prove the intention of acts, in themselves perfectly indifferent and innocent, by confessions of the accused twenty years ago. On Blannerhassett's Island, from what you have heard from the witnesses, there was nothing but peace and innocence; no acts of war. The constitution of the country having declared that there must be two witnesses to prove the same overt act, and that no person can be convicted without such proof or *his own confessions in open court*, the accused may plead this provision of the constitution in his defence. He may urge that he cannot be convicted of treason, of half the crime, or any part of it, by *confession out of court;* that

no confession *out of court* should be given in evidence against him; that the true meaning of the constitution is, that he can only be convicted by a confession *in court*, or by proof by two witnesses of the *same overt act;* which overt act includes intention as well as the act, because it cannot be an overt act of levying war without a treasonable intention; that the intention is part of the crime, nay, in their view it is *all* the crime; that consequently, to secure the substantial benefit of the constitutional provision, the two witnesses must prove the criminal intent of the overt act as well as the commission of the act itself; that this act must not be innocent or indifferent. It must be unequivocally traitorous from its nature and character. They must prove the quality and nature of the act as well as the act itself. All this he may urge in vain. He will be told by the prosecutor that a confession anywhere and at any time is proper evidence of intention, as he has proved the overt act. The whole evidence to support a charge of treason may thus resolve itself into the *naked intention.* I believe, sir, you will find, that according to this view of the subject, treason consists in the heart, and can only be known to the traitor and his God. It is the very construction which the constitution intended to exclude. The substantial part of the character of treason consists in the *act.* If it consisted in any case of an assemblage, the guilt should result from the *character* or quality of the assemblage itself as being unequivocally military or warlike, and not be represented as treasonable by evidence of intention or confessions said to have been expressed at another time and place; which confessions may have been unguardedly expressed, not truly recollected or wilfully misrepresented, and are the most uncertain and dangerous of all testimony. If proof of a guilty intention be thus to make treason, there is no possible case in which an overt act may not be proved, notwithstanding the security intended by the constitution. I will suppose, then, that on the trial of this fourth person, a witness is called up to prove the intention of the supposed overt act. The objections he would make to the evidence would be, that the intention itself constituted an ingredient in the composition of the crime; that the constitution requires two witnesses to the overt act, not in

construction, not in the abstract, but in truth and reason; that as the intention made a part of the crime, it was inadmissible to prove that intention by one witness, which would be to prove it by a less number than the constitution required; that the act could not be constitutionally proved without proving its guilt. He would be told that the constitution speaks only of an overt act; that an overt act consists in an assemblage; that if they could prove two declarations or confessions of his intention, each by one witness, as one by General Eaton and one by Mr. Morgan, it would be sufficient, since the overt act consisted of an assemblage. Should he again object that these words had been uttered a very long period past, almost twenty years ago, and that he had declared a thousand times since that his purpose was innocent and honorable, these objections would be of no avail. If declarations made to Eaton two years ago were now to be admitted as evidence against him by this court, though repeated declarations of his innocence were made by him since, it would be immaterial whether these retrospective declarations were two years or twenty years past. The principle is the same; the evidence in both cases equally exceptionable. We will suppose that he is overruled by the court in every proposition which we have made to the court; that it decides that an assemblage of three individuals, unarmed, and without the commission of any unlawful act, is sufficient to constitute an overt act of levying war; that their entire ignorance of any treasonable project and devotion to the laws of their country will not prevent the legal guilt of their assemblage, provided the intention of the *fourth* person can be proved to have been what the prosecutor is pleased to call treasonable, and this proof to be made out by evidence of his own declarations or confessions many years before. In this state of the trial of this fourth person, no criminal *act* whatever having been proved against him, and the assemblage of three persons having been proved to be peaceful, innocent, and patriotic, suppose a witness to be brought forward by the prosecutor to prove a confession by the prisoner, many years before, of a treasonable intention, I ask you whether you would tolerate a doctrine so well calculated for the destruction of innocence and the evasion

of the constitution, as to hold such evidence relevant. If this retrospective evidence is to be admitted of declarations two years before, it may on the same principle be received for twenty years back. These declarations of design, these confessions with respect to intention, are extremely uncertain. They may have been uttered in a loose, unguarded manner, or may have been spoken in a jocular conversation, or by way of mere vague speculation. What was said by the accused may have been expressed when the witness was in a state of ebriety, so that he did not distinctly hear or well understand it. He may not accurately recollect it as he heard it. And these substantial objections to this species of testimony cannot be affected by the integrity of the witness. But is there no danger of a conspiracy against the life of the accused by perjury and subornation? This prosecution is to be sustained by the doctrine of confessions. The act which is sought to be converted into treason is innocent in itself, and cannot be made guilty by confession. You will recollect that Blackstone, in his Commentaries, tells us that "these confessions are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by negative evidence." Which doctrine is confirmed by Foster, who expresses his opinion of this species of evidence in terms of strong reprobation. This dangerous kind of evidence was certainly intended to be excluded by the constitution, in providing that treason should consist only in levying war, &c., and that "no person should be convicted of it unless on the testimony of two witnesses to the same overt act, or confession in open court." It certainly intended (as did also the act of Congress) that there should be two witnesses as well to prove the *quality* of the act as the act itself. The *act* must be war in itself, not an innocent act rendered treasonable by evidence of confession; and this is the only rational and safe construction. Any man may become the victim of malice, if it be rejected. Even in England we are told by Blackstone that the principal reason which induced the passage of a law there, requiring that there should be two witnesses to the

same overt act, or one to one overt act and the other to another overt act of the same species of treason, was *to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.*" When the life of a man wholly depends on such evidence, it certainly ought not to be regarded.

The brace of swearers from Wood County, *Taylor* and *Allbright*, are the leading witnesses for the prosecution. They are like *Dogberry* and *Verges*, in Shakespeare's "*Much Ado about Nothing*," a comedy which these two witnesses have been acting here. The constable, if I recollect rightly, was employed in securing malefactors. "*You will recollect, sir, which be the malefactors.*" *Dogberry* answered, "*Marry that am I and my partner.*" The *Dogberry* from Wood County might with great truth have answered in the same manner. Taylor's account of what Colonel Burr said to him is ridiculous and incredible. He begins his tale with a statement of his delivering to Colonel Burr Mr. Smith's letter to Mr. Blannerhassett, which enclosed another to Colonel Burr. After a very short desultory conversation between them, and before the letter was opened and read, Colonel Burr, to whom he was an utter stranger, promptly and without reserve tells him, "I am the very man who is involved in all this business." What business had been mentioned before? Not a word had been said about treason or any other crime before; and yet Colonel Burr, without any hesitation, reserve, or motive, is said, by the representation of this man, to have made a full disclosure of his plans and views; for that is clearly implied in the answer. He makes this disclosure, too, not by degrees, dark hints, or in a cautious manner, but openly, explicitly, and most unguardedly, to a man of whom he knew nothing, and whom he never saw before. So that Colonel Burr, who is said to have been always, especially in everything relating to what is called the Mexican expedition, extremely reserved, cautious, and prudent, is made out by this man to have betrayed himself with the most incautious and unaccountable levity. It is impossible to confide in this part of his narrative.

He next introduces General Blannerhassett and himself as his aid. When all his schemes are developed to

this man, Taylor asks his general what was to become of the men who were going to settle the lands he talked about. What was his answer? He stabs all the soldiers — and laughs! Instead of giving an appropriate answer, such as might have been naturally expected, he speaks on another subject, and swears that he will stab every man that will not conform to order and discipline — laughing at the same time! Very valiant indeed! and a very excellent recruiting officer he must be, thus to announce the measure. Mr. Blannerhassett is a man of sentiment, science, and humanity. His character is well known. He could not have spoken with such unfeeling levity and brutality of taking away the lives of his fellow-men. A man of his refined sentiments and philanthropy would never have expressed himself on such a subject in such a manner to any man, and much less to such a man as Taylor; and yet this is the man who had the capacity to understand, and veracity to relate, whatever passed between Mr. Blannerhassett and himself! He further states that Mr. Blannerhassett sent him with a letter to Doctor Bennett, and tells him, "This letter contains high treason." And this was without any introduction, without any inducement or reason for so dangerous a declaration. No man in his senses would have exposed himself unnecessarily by so hazardous an avowal. Mr. Blannerhassett must have spoken the words in a jocular and sportive manner, or the witness deliberately lies.

If we examine further, we shall find that he is no more to be depended on in point of understanding than in that of integrity. He first said (before he was informed of his mistake), when stating what Mr. Smith had told him to do, that "*he chastised me not to go into a tavern.*" I should indeed have supposed that he knew very well the meaning of chastisement, and would not have committed such a mistake. But certainly it must be presumed that Mr. Blannerhassett would have chosen for his confidant, to whom he would communicate his most important secrets, a person not grossly ignorant, but on whose understanding he could place some dependence. In another instance he shows the same remarkable want of information. When stating to the court that he had refused to grant the request of some persons to carry them in his boat across

the River Ohio, he said, "*I accepted to it*," meaning, "*I objected to it*." It may be truly said of this man, that it is difficult to say whether his evidence discover more vile depravity or gross ignorance ; yet it is by such witnesses that the treason is to be proved and the life of an innocent man to be taken away.

Here Mr. Botts suggested to the court the propriety of adjourning, and requested permission to finish his argument to-morrow, which was granted.

WEDNESDAY, AUGUST 26, 1807.

Mr. Botts addressed the court ; and after having briefly reviewed the substance of his argument, yesterday, proceeded as follows : —

The Mississippi territory and Kentucky, as we are informed, were the seat of the war. But the simpletons of that state and territory hunted, but could not find the war. They were so stupid as not to perceive in a collection of men without arms, without any possible means of annoyance, without any hostile disposition, and without the possibility of getting away their women and families, anything criminal, much less any aptitude to overturn two mighty empires. It remained for us, the members of the Virginia bar, to come out and astonish the world with the profundity of our learning in matters of war. They have ascertained that there was a terrible war. I ask you, What manner of war was it ? We have had a much more serious war here than was on the island. We have had here a carnage of breaths, sour looks, and hard words, and the roaring of vocal cannon. We have had a battle with the laws and constitution, fought courageously and furiously by our enemy. Is it not a mockery to speak of the war on Blannerhassett's Island ? Shall we not be the sport of Europe and the world by such a discussion ? We are gravely deliberating whether an act eminently characterized by peace and good order were war or not. Sir, there was nothing on the island that was not directly opposite in all its parts to war. If saying a great deal, if vociferation, if a great deal of vocal roaring may be war, then we have had war. We have had some terrible roaring of cannon at Culloden from General Wirt. He told us that the thunder of the

cannon and clangor of the battle were heard in every part of the kingdom. And we have been told by another gentleman that war may be made upon us from Europe at the distance of three thousand miles. It is true that you have heard a great deal of debate, whether this little miserable party did not make a warlike assemblage. Their own evidence is conclusive to show that this little assemblage was innocent in all its parts, and yet you are to sit here with gravity to hear about this war! There was, indeed, on the island a dreadful war of sympathy and sorrow. A mother in tears with her children around her, driven from their home by a mob, the windows of their house broken, their property destroyed, and the lives of the family endangered. Sir, I understand that these acts of violence are as conspicuous features of war as any. I have thought the persons who attacked the people on the island a mob. It was said that they were the regular militia of Wood County. The regular militia could not be called out but by the President of the United States or the Governor of Virginia. There were, I believe, no orders from or communications with the governor; and the president can never be truly said to have given orders for the destruction of Blannerhassett's property.

I addressed you, yesterday, on the subject of admitting evidence of the overt act, by proof of the confession of the accused out of court. Extraordinary acts are used to distinguish them from ordinary acts. Such, as innocent assemblages, are common to all men. The citizens of our country are protected against prosecutions for all other crimes by the necessity of proving an extraordinary act; as in the case of a prosecution for murder, the homicide must be proved; and in that for stealing, the larceny or taking and carrying away of the property must be proved. In both cases the previous necessity of proving this extraordinary and important fact affords considerable security. There is no ground for malice or revenge. The homicide is unsusceptible of being proved by perjury. The body of the deceased may be viewed, or if the man be alive, or his death cannot be proved, the accused is discharged. In larceny there is nearly the same security. The existence, removal, and finding of the

goods, exclude the admission of proof by false swearing only. But in treason, where there is the widest field for the operation of the malignant passions, and the greatest danger to the safety of the citizen, there ought to be the greatest security; and the constitution intended to give this security. Yet, according to the construction for which gentlemen contend, there will be the utmost danger. The constitutional provision will be illusory and deceptive. In the cases which I have adduced by way of illustration, there is no question as to the existence of the principal fact. The homicide is committed, and the goods have been stolen; and the only inquiry is, whether the accused have committed the offence or not. The acts of the assemblage on the island were as innocent and harmless as the acts of this assemblage. The question before the court is exhibited in an abstract form. The argument in support of the motion neither admits nor controverts the overt act. We take what happened on the island as an abstract proposition, admitting the facts as proved; but we insist that protection is afforded to the accused by the constitution, by requiring the necessity of proving by two witnesses a direct act or open deed of treason; an act in its own nature and quality treasonable, and not made so by proof of confession. If these confessions be admitted to prove innocent acts to be treasonable, no man can be safe. In vain may any of us be assailed by a scandalous accusation of the murder of an individual, till an actual death be proved. The most malignant charge of the deprivation of the life of any human being will avail nothing so long as the prosecutor is unable to prove the death. In vain may any man be accused by the most artful and malicious informer of stealing a horse till the fact of stealing the horse be proved. The principle is the same in other felonies. No instance can be mentioned where a false accusation can affect the life of the party accused till the important fact which constitutes the crime be first established. But is it so in treason against the government? An assemblage is an act (if it can be properly so called) in which every man is concerned, and which may be fixed on any man. There is no necessity of proving anything more than a prior intention. Let me illustrate this case more

plainly. Here is an assemblage of men now. The assemblage was here yesterday. Every gentleman here, I aver, has been guilty of treason, and has levied war against his country. I select the very scene before me as furnishing proof of the overt act. Here is an assemblage of men, and arms, we are told, are not necessary. A witness may be brought to prove confessions on the part of any of us; that though we are carrying on a judicial examination, yet it is to cover a design, a fixed though secret determination to carry on war against the United States. If the individual accused attempt to put himself on the constitution of his country, if he attempt to stop the proceedings against him by saying that there is nought here but peace, that there is no act of war, that there is no movement of any kind that indicates hostility to the government of the United States, he will be told that his attempt ought not to succeed; that confessions are the strongest and best proof of a man's guilt; that confessions of the intention are admissible at any distance of time and place. There is no difficulty, then, but to show that the assemblage met here for the purpose of levying war against the United States; and this can be done by proofs of his own explicit and voluntary confessions. According to this doctrine, the peaceable character of the assembly will avail nothing. Well, sir, is not the case at bar the same in principle? In what does the case differ from what happened on Blannerhassett's Island? It is not contended that what is passing here now is more peaceable than what was done on the island without coupling the intention; and criminal intentions may be thus coupled with the presence of any individual in this assembly in order to prove him a traitor. If this assembly be peaceable and innocent, that on the island was equally so. Of all evidence this is the most dangerous. By its means a conspiracy may be easily and successfully devised against the life of any individual. But as an instrument in the hands of a malignant government, it is peculiarly dangerous to the liberty of the citizens. This construction, which permits an act indifferent or innocent in itself to be converted into a treasonable one by proof of confessions, opens a most ample field for the operation of malice, hatred, revenge, and all the malig-

nant passions of the soul. It gives such a range to power and state policy as to swallow the liberties of the nation. It deters men from resisting usurpation. Patriots in opposition to the oppressions of the government will sink under an executive frown, and the vitals of the constitution will be preyed on and destroyed. We apprehend no danger from the excellent government which we now have. We do not believe that the patriotic individuals who administer it at present will ever abuse our just confidence in them, but we cannot extend this confidence to their successors. Besides, dangerous precedents may be set in times of confidence and security. The people, feeling confidence in their present rulers, and apprehending no future danger, fail to examine public measures with strict scrutiny. Hence some are adopted unnoticed by the people, and perhaps undesigned by their rulers, which operate oppressively under an unwise or wicked administration. Let us suppose that our present rulers should be succeeded by persons disposed to assume power. Let us suppose the government to be administered by a president of the United States who should assume to himself the prerogatives belonging to a British king; that he should do this by art and dexterous contrivance, by first rendering himself popular, and then prevailing on influential individuals to meet his views; that by the negligence of the people, or in the plenitude of his own authority, he should arrogate these great powers unknown to the constitution; that he should be persecuting the citizens, especially those who opposed him, and be attempting to make further encroachments. Let us suppose that a formidable band of chosen patriots should rouse the people to a sense of their danger and the necessity of resisting his tyranny. Would it be a difficult matter to put them down, defeat their exertions, and destroy them? Would this be difficult for him who has the treasury at his command, the civil and military authority under his control, and an immense patronage in possession? I apprehend that it would be an easy matter, in the nature of executive power, for such a president, unprincipled and able as he must be, to furnish the means of coupling wicked intentions with innocent acts, and thus secure complete success to his usurpation. It was

to prevent this that the convention, in framing the constitution of the United States, took such great care, that in the important crime of treason there should be protectection to the citizens by the necessity of proving an overt act. They were perfectly ignorant that a quiet and peaceful assemblage of men would be such an overt act; nor did they suppose that what amounted in their time to nothing would ever be tortured into the heinous offence of attempting to subvert the constitution and government of the country. I beg gentlemen to reflect. Have they no feeling on the subject? Those definitions and doctrines are only fit for the court of Jeffreys, or the government of Robespierre. They are as far from affording constitutional security to the people as heaven is from hell. Instead of securing the liberty of the citizens by repressing and preventing oppressive persecutions, they have a *direct* and *certain* tendency to its destruction by encouraging them.

These doctrines will be found, on due consideration, to be in opposition to the opinions of the judges. Judge Iredell's opinion on the trial of *Fries*, page 171, proves that there must be two witnesses to prove the intention as well as the act. He says, "As I observed, *there must be two witnesses at least to prove that the act of treason was committed at Bethlehem.*" And, addressing the jury, he says, "If you are not well satisfied that the *overt act of treason was committed at Bethlehem*, and that *that overt act is supported by the evidence of two witnesses at least*, you will not find the prisoner guilty." So that the act which they must prove must be an overt act of treason including intention as well as the act. With respect to the confession of the prisoner, he says in the same page and the next, "It is the provision in England, as well as here, that no confessions of the prisoner, independent of two witnesses (unless the fact have been established by two witnesses), should be sufficient to convict him; but if two witnesses have proved a fact, the confession of the party may be received by way of confirmation of what has been before sworn to. In former days in England it was allowed that confessions out of court and the proof of the witnesses should warrant a conviction; *but happily our constitution would not admit it, if a hundred*

would swear to it: that danger is wisely avoided." Connect this opinion with that of Judge Chase (on the trial of *Fries*, page 147), showing the necessity of force, and they will show the nature of the overt act which must be proved, and that confessions are not admissible to prove it: "The court are of opinion that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution. *Some actual force must be used*, in pursuance of *such design to levy war*, but it is altogether immaterial whether the *force* used be sufficient to effectuate the object. Any *force* connected with the intention will constitute the crime of levying war." The judge then states that "the opinion of the court is founded on the same principles, and is in substance the same, as the opinion of that Circuit Court for this district on the trials (in April, 1795), of *Vigol* and *Mitchell*, who were both found guilty by the jury, and afterwards pardoned by the late president." These very opinions are referred to and approved of by the Supreme Court. In the case so often quoted of Bollman and Swartwout, it says that "in conformity with the principles now laid down have been the decisions heretofore made by the judges of the United States. The opinions given by Judge Patterson and Judge Iredell, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. *Their opinions, however, contemplate the actual employment of force.* Judge Chase, in the trial of Fries, was more explicit. He stated the opinion of the court to be, "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by *force*, they are only guilty of a high misdemeanor; but *if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war;* and the quantum of the force employed neither lessens nor increases the crime; whether by one hundred or one thousand persons is immaterial." They then quote the paragraph before cited from Fries's trial.

What sort of an overt act is here meant as necessary

to be proved? Does it not mean an overt act that evinces the treasonable intention? What is here meant by an assemblage which amounts to or constitutes an overt act? Do the judges mean an assemblage or meeting of a number of men together, exhibiting no external evidence of being or acting as traitors, or an assemblage of men proceeding immediately to acts of war? If any sort of an assemblage, however lawful or innocent, be meant, it is ridiculous to require the formality of producing two witnesses to prove such an assemblage. The passage must mean such an assemblage as evidently evinces a treasonable intent. The *overt act* is a *plain, open deed* of war, and required to be proved by two witnesses, because it is intended to be contrasted with *words, declarations*, or *confessions*, which may be too easily proved by perjury. *Foster*, 208, has been cited to show that arms are unnecessary; but this authority operates decidedly against the prosecution, if it be properly considered. He admits, indeed, that *military* weapons are not necessary, but he adds the reason, that "the *numbers* of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect; adding what is as expressive as it is true, *furor arma ministrat*," that their fury supplies them with arms sufficient for their purpose.

The court, in delivering its opinion on the trial of Fries, refers to the opinion in the same Circuit Court in Pennsylvania, in the cases of Vigol and Mitchell, delivered in the year 1795, and it declares its opinion in Fries's case to be on the same grounds and principles. The court, in those cases in Pennsylvania, adopts the English doctrine, and dispenses with the necessity of arms, with a qualification that their numbers and other weapons of the insurgents supplied their want of arms. For in those cases the insurgents were in military array, and had besides guns and swords, axes and other weapons capable of accomplishing the meditated mischief. Admitting this doctrine to apply to the United States, were the number of the people on the island so great that it supplied the want of arms? Had they any other weapons calculated for the perpetration of mischief? In

all the cases mentioned in the books it is stated that numbers are not necessary to levy war; that it is "wholly immaterial whether they amount to one hundred or one thousand;" but it has never been said that war could be levied by a less number than one hundred. No man of any character or knowledge will say that he has ever heard that a less number than one hundred were said to have levied war. I shall read some parts of the opinion of the Supreme Court in the so often referred to case of Bollman and Swartwout. I do not know that I understand the whole of that opinion correctly, nor whether some parts of that opinion can be reconciled to other parts of it. The court takes great pains to show the necessity of an inflexible definition of treason, and describes the inconvenience and calamitous consequences which a flexible definition is calculated to produce. But I believe I do understand it, and that its different parts may be reconciled. The first part of this opinion which I shall read, after having thus called to your recollection its idea as to the inflexibility of the definition of the crime, is in the words following: "To constitute that specific crime for which the prisoners now before the court have been committed, *war must be actually levied against the United States.*" From these plain words it seems evident to the meanest capacity, that unless there have been an *actual* war levied against the United States, there can have been no treason committed. And the question then is, whether war have been levied on Blannerhassett's Island or not.

The opinion then proceeds: "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the *assemblage of men* for a purpose treasonable in itself, or the fact of *levying war cannot have been committed.*" Again: "On the contrary, if *war be actually levied*, that is, if a *body of men be actually assembled* for the purpose of effecting *by force* a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be consid-

ered as traitors. But there must be *an actual assembling of men for the treasonable purpose*, to constitute a levying of war." Again it says, "*To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design.*"

Here the idea is explicitly expressed, and repeated four several times (and it is mentioned several times thereafter in the same opinion), that there must be an *actual* (as contrasted to constructive) assemblage or body of men met together to execute a treasonable design. But though the idea is so often and so plainly expressed, that there must be an assembly or body of men to put in execution a treasonable purpose, it does not state the number of which such an assemblage ought to consist. I would then put that question, of how many men must the assemblage so frequently spoken of consist? A trivial number would certainly not be sufficient, for it would be equivocal, as it would have no warlike appearance; for the court, in another part of its opinion, admits that where the assemblage had no warlike appearance, it is equivocal, and probably not sufficient: "The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance." We understand the court by these words to say, that the number in order to be sufficient to amount to a treasonable assembly must have an unequivocally warlike appearance. Let this test, then, be applied to all cases of this sort. Apply it to what happened on Blannerhassett's Island. The Supreme Court thought proper, though the occasion *seemed* to call for the expression of its opinion as to the sufficiency of the number, not to mention it, but to leave that point open to be determined according to circumstances at a future period. A particular number of men is mentioned in the deposition of General Eaton, as having been alleged by the accused to have been adequate to the attainment of a particular purpose. No comment is made as to the sufficiency or insufficiency of that or any other particular number. Of how many men, then, must this body consist? Would three do? or would twenty or thirty be sufficient? Would less than one hundred

be sufficient? or must there be that *special* number more or less? I understand from this opinion that an assemblage marching from a place of partial to a place of general rendezvous would not be a sufficient act to constitute levying of war, unless the body so marching had a warlike appearance, or was marching directly to the scene of action; for the opinion cannot be reconciled to itself unless this be its meaning. For though it states "that the meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage," it had just before declared that the travelling of individuals to the place of rendezvous would be equivocal, and not have a warlike appearance. It could not understand by this that three men marching without arms from a place of partial to a place of general rendezvous would be an act of treason in levying war, if a thousand men, well armed and disciplined, travelling to the place of partial rendezvous would be insufficient for that purpose. In order to make the opinion consistent with itself, it must be understood to mean that any body of men must have an unquestionably warlike appearance to constitute of itself an overt act of war. The reason why the opinion of the court is thus susceptible of doubt is, that the court was not illustrating that point, nor was it in its contemplation to fix the law as to the number necessary to constitute a treasonable assemblage. I ask, what is marching to a place of war but preparing for war? I ask whether preparing for war and making war be the same thing? I ask whether, as the law has defined this greatest of crimes known to it, that it "shall consist in levying war," a court, in expounding its rules, shall declare that *preparation* to levy war will be *levying war?*

When the Supreme Court was deliberating on the case of Bollman and Swartwout, it was deliberating on a subject not before it as far as this case is concerned. Whether an assemblage with a treasonable intent were war or not, was not such a point as was necessary to be settled in Bollman and Swartwout's case. Mr. Hay, in opening his argument to the jury, insisted, and referred to the opinion of the Supreme Court as supporting him, that a body of men actually assembled for the purpose of effecting by force a treasonable design were guilty of an

overt act of treason in levying war; that is, their *merely meeting* for *that purpose, without committing any act*, amounted of itself to an act of treason. We contend that it was not necessary, in the case before the court, to determine whether such an assemblage amounted of itself to an act of treason or not; and consequently that the declaration of an opinion on a point not before the court, and not necessary to be settled, was extrajudicial, and cannot be considered as authority by this court. If it were unnecessary to settle that point, the opinion will not be denied to be extrajudicial. We are, then, to inquire whether it were necessary that the Supreme Court of the United States should in that case settle the point whether an assemblage of men with a treasonable intent, without arms and without force, of itself made war or not. Was it necessary that the court should say that force must be used, or that a bare assemblage with an intent to commit treason was an overt act of war, when there was neither force nor an assemblage proved to have existed in the case before it? And if there was no assemblage, was it necessary to inquire into the effect of an assemblage for the purpose of settling rules concerning it? Would not the court, when about to do an act which would bind future cases, examine it to the utmost extent? Would it not have bestowed the greatest deliberation and reflection on it, and taken full time to consider it? When about to settle an important point relative to this high crime, would it not have called for the assistance of the bar on that very point? The effect of an assemblage was not a question mooted at the bar. Would the judges not have preferred to consider the subject in vacation, when, having their libraries at hand, and sitting in their closets, they could more maturely weigh, and more satisfactorily to themselves determine, the question? And could they not then have obtained the aid of the bar to assist them in forming the best opinion that they could? I have no doubt that they would have pursued that course, but having then no time or opportunity to examine the English books, they were extremely illy qualified to have delivered an argument about the overt act. And with respect to aceessories, there never was a question in this country in which it was necessary to settle the doctrine

concerning them, the extent of their liability, or the mode of proceeding against them.

The judges of the Supreme Court refer to the opinions of the judges of the Circuit Court in Pennsylvania, and profess to determine on the same principles. The cases decided before the judges in Pennsylvania were cases of rank hostility, of direct and immediate violence committed by the prisoners. As actual force was used in those cases, and there was a great assemblage, it was not necessary to decide a question relative to the effect of a mere assemblage without violence, or whether such a body would be sufficient of itself, without force, to constitute an overt act of war.

There are in England two great classes of treasons, the one relating to the mind, the other to external acts. The one is compassing the death of the king, and is a distinct species altogether from the other, of levying war. It consists in the intention or mere design of the mind or imagination, without any act consequent on such design, except such as evidence the contemplation of such design, or existence of such intention. But there must be some fact proved by two witnesses to show this intention. Confessions alone, without an act, are not admissible. The other class of treasons is that of levying war, or adhering to the enemies of the country, giving them aid and comfort. The rules applying to the first class, as it does not exist here, can have no effect here. The subject of the present inquiry is the first branch of the only class of treasons existing in the United States, that of levying war, and consists entirely in palpable, open acts of war, which, in the very nature of things, implies force and violence.

I have said that an opinion given by any court on a point not necessary to have been decided is extrajudicial, and not authority.

Mr. Mac Rae and Mr. Wirt have both stated that they were at a loss to perceive how the opinions of the Supreme Court, and of the judges of the Circuit Court of Pennsylvania, were extrajudicial. It then becomes necessary for them to prove that they were *judicial*, and necessary to have been decided in that case. The *onus probandi* lies upon them. If they cannot show that it was necessary to decide that a mere assemblage, without arms and with-

out force, but having treasonable designs, constitutes alone an act of war, the decision can be no authority for them.

But, sir, I believe the truth to be that the opinion of the Supreme Court is misunderstood. The parts relied on by Mr. Hay are so qualified by other expressions in the opinion as to exclude the construction for which he so confidently contends. This point was not necessary to be decided in that case. But if that decision imported what Mr. Hay contends it does, it would go to overrule the constitution of the United States. If that decision go to the extent supposed by the prosecutor, and is extrajudicial, are you bound by it? *Foster*, 36, 37, states in very clear terms that very little regard is to be paid to extrajudicial opinions. It was in the case of the two Kinlochs, on a motion made by their counsel in arrest of judgment, on the ground that the first jury which were charged and sworn to try them were discharged, though by their own request, and for their own advantage (in order to give them the benefit of a plea to the jurisdiction), and with the consent of the attorney general, and that their trial afterwards by the same jury was a mistrial. In the course of the arguments in support of the motion, "it was said, on the authority of a very short and imperfect note in Carthew, that all the judges of England, upon debate among themselves, had come to a resolution, that in capital cases a juror cannot be withdrawn, though all parties consent to it." It was very properly asked upon what occasion this debate among the judges was had; whether any case were then depending in judgment before them which gave rise to the conference, and which was to be governed by this resolution; and what were the particular circumstances of that case, if any such there were. These questions, I say, were very properly asked; for the true extent of all rules of this kind, however generally they may be penned, is, and always will be, in a great measure adjusted by the circumstances of the case under consideration at the time when the rule appears to be given. As satisfactory information could not be obtained relative to this resolution, and as it was only said, upon the authority of a manuscript of a late learned judge, that it was taken upon a conference among the judges in relation to an indictment against the sheriff of London

for a bare misdemeanor (but what were the circumstances of that case, or what became of it, did not appear), Judge Foster declares his opinion thus: "I freely own this extrajudicial opinion (for with regard to capital cases it is so) weigheth very little with me in the present question, and doth by no means shake the authority of Rockwood's case, which I take to be a case very nearly in point with the present; and, moreover, was a case where the point did judicially come before the court, and in which the court had the assistance of very able counsel on both sides of the question."

It is therefore evident, that as the cases are unlike, as these points were unnecessary to be decided in that case, and came not judicially before the court, and as the judges had not the assistance of counsel, their opinion ought not to be taken as authority to establish the doctrine urged by Mr. Hay. It seems to be founded on the opinions of the Pennsylvania Circuit Court. In the cases before the Pennsylvania judges, there was direct and outrageous hostility and violence committed by the prisoners, who were part of an immense assemblage. It is probable that the judges of the Supreme Court did not fully advert to the circumstances of those cases as they presented themselves to the Pennsylvania judges. They took it for granted, as the cases were solemnly decided, that they justified every observation made respecting them. If they had looked into those cases themselves, they might have drawn different conclusions from them. We are therefore at liberty to consider the original source of the opinions of the Pennsylvania judges. If, on further reflection, your own understanding be convinced that this doctrine has arisen from mere accident, and without due examination, I ask you whether it is to go down now with you? No, sir. Who are the gentlemen who now urge the authority of this decision? They are those who joined in the general outcry against, and reprobation of, the doctrines of the judges in Fries's trial. Those gentlemen, who were of different political principles, rose in a mass in rebellion against those doctrines. Some of them were considered to be so violent and oppressive that it was thought that both parties in politics ought to join in their condemnation; and it is believed that both parties did

join for that purpose. Mr. Lewis and Mr. Dallas, two very learned and able counsel, but of different political sentiments. defended the prisoner, and united in expressing their abhorrence and detestation of some of the doctrines avowed in that decision, and their dissatisfaction with the conduct of the judge. They wished to address the court on the question of law in behalf of their client, but they were forestalled by the judge, who delivered an opinion previously prepared and prejudged, without having heard counsel in vindication of the prisoner, and thus, by the rigor of his conduct, prevented them from rendering any benefit to the unfortunate man, as they disdained to appear in so degraded a situation, trammelled and tied down by a prejudicated opinion. The prisoner was of course convicted, but afterwards pardoned by the president. The judge was afterwards impeached for the very part he acted in this trial. Gentlemen who were themselves the loudest in the general reprobation of those doctrines are now willing, not only to consider, but to enforce them as authority. Judge Tucker has, with great ingenuity, ability, and profundity of research, investigated the subject, and clearly shown that the doctrines, as reported to be generally laid down in that trial by Judge Chase, are erroneous in several respects, but especially as they relate to accessories. For my own part, I am seriously apprehensive of mischief to the liberties of the citizens of this country, if these doctrines prevail.

In confirmation of these remarks, I beg leave to refer to the opinion of the court lately given on the certificate of Mr. Cenas. If, then, the necessity of force, the doctrine of accessorial agency, and the question what should constitute a treasonable assemblage, were points not before the Supreme Court; if the judges themselves who delivered their opinions did not examine the opinions and doctrines of the English judges, but solely referred to those of the Pennsylvania Circuit Court judges; and if the Pennsylvania judges did not examine these points because they were unnecessary to be decided on those trials, because great violence and force had been used by the prisoners in person; if all these things be true, I ask, what authority ought to be attached to the opinion of the Supreme Court relating to these points?

I have said that some parts of that opinion relied on by the counsel on the other side are, according to their construction, utterly irreconcilable to other parts of it. There is a *generality* of expression whenever you speak of an assemblage, which shows the bent of your mind on the subject to be to consider them as armed and in a situation to use force, though you mention neither arms nor actual force. It is the *generality* of these expressions which has enabled the gentlemen to advance such extraordinary arguments and doctrines; for when you speak of an assemblage, you do not say how many persons must compose it, or whether it must have a warlike appearance or not.

But notwithstanding these general expressions, they may be controlled by other parts of the opinion, and explained by the opinions given by the judges before on the same subject. Judges Chase and Iredell and yourself have all concurred in recognizing the just caution of the convention in establishing in the constitution the requisition of proof of the same overt act by two witnesses at least. In explaining this provision, you have supposed that it was contemplated, not as an ordinary, but as an extraordinary, act. You have thought that this extraordinary act could not be done in secret, but in the face of the world; that without *this* proof of the open, notorious deed, the evidence of a thousand witnesses, proving declarations or confessions, would be insufficient. Yet if the crime consisted in the intention, and if any sort of an assemblage, such as is common to all men, would do, your reasoning would be incorrect, and the constitutional provision would produce no security whatever.

It is alleged that the Supreme Court has said that *actual force* is not necessary to constitute this crime. We are also reminded of the concessions of Lewis and Dallas, that force was unnecessary. To this allegation, and to these supposed concessions, I will oppose the act of Congress founded on the constitution, and the opinions of the judges in explanation thereof, as well as other parts of the same opinion of the Supreme Court.

The act of Congress, *page* 100 of 1*st vol. Laws of the United States*, declares "that if any person or persons owing allegiance to the United States *shall levy war against them*, or shall adhere," &c., "*and shall be thereof*

convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason, whereof he or they shall stand indicted, such person shall be adjudged guilty," &c. This overt act of treason in levying war *must be in itself war.* It cannot be perpetrated in secret. The two witnesses must not only *prove* the *act,* but *the quality of the act.* The act in which the treason shall consist must appear not to be an ordinary, but an extraordinary act, having the nature, essence, and character of *war.* The opinion of Judge Chase has been already read more than once, wherein he declares that "*some actual force or violence must be used in pursuance of such design to levy war.*" In your own opinion, delivered on the examination of Colonel Burr, you declared that "*war can only be levied by the employment of actual force;*" and you also said that "*treason may be machinated in secret, but it can be perpetrated only in open day, and in the eye of the world. Testimony of a fact which in its own nature is so notorious ought to be unequivocal.*"

The language of the Supreme Court in some other parts of that opinion, which has been so often and so exultingly referred to by gentlemen in support of their construction, is equally explicit in favor of our doctrine: "*To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States.*" This opinion cites with decided approbation the opinions of the judges of the United States which had declared *force* to be essential to the consummation of treason. It states that "the opinions of Judges Patterson and Iredell *contemplate the actual* employment of force;" in which sentiment it adds that "*Judge Chase is more explicit.*"

Judge Iredell expresses himself in terms equally clear in the trial of *Fries,* 166. Addressing the jury, he says, "But on the occasion now before you, it is not attempted, by any construction or interpretation, that anything should be denominated treason that is not precisely and plainly within the constitution. *No treason can be committed except war has actually been levied against the United States.*"

So that four judges have each of them separately declared that *actual force* is necessary to constitute treason;

and these declarations or opinions (three of them having given their opinions before the Supreme Court) have been approved of by the Supreme Court in that very judicial sentence on which the prosecutors rely; and the Supreme Court collectively, and Judge Iredell separately, declare, that *in order to constitute the specific crime of treason, war must be actually levied against the United States. War* must be *actually levied*, force must be actually employed. What do these expressions import? The word *actual* must be used as opposed to *constructive. Actual levying of war* must be used as opposed to *constructive levying of war;* and actual force must in like manner be opposed to *constructive* force. Actual must mean *real.* They should therefore prove that war has been really levied, and force in fact used, against the United States.

I had forgotten another part of Judge Chase's opinion, or rather that of the Circuit Court in which he presided, to which the Supreme Court refers when it says that he was more explicit, which confirms the argument which I have been endeavoring to support: "If a body of people conspire and meditate to resist or oppose the execution of any statute of the United States, they are only guilty of a *high misdemeanor;* but *if they proceed to carry such intention into execution by force*, that they are guilty of the treason of levying war." Again: "A combination or conspiracy to levy war against the United States is not treason *unless combined with an attempt to carry such combination or conspiracy into execution.*" Immediately after which he says that some actual force must be used. So that it is perfectly plain, on a careful examination, that the court thought that some degree of force must be used before the crime is complete.

The case in *Kelyng*, 78, 79, where the four special verdicts were found against several persons prosecuted for treason, shows decisively the necessity of *potential*, if not of *actual*, force, and is completely exclusive of the idea that a mere naked assemblage, without arms or force, constitutes treason. Acts of violence were committed by those persons, but all were not equally active, and some were merely present without doing anything. As to those who committed no actual violence, who used no force, they were acquitted; but the party consisted of a great

number of persons, had arms, pulled down some houses, broke open a prison, and let out several prisoners, and were proceeding to do more mischief, when they were suppressed. The court was unanimous that "as to Green in the first special verdict, and Bedel in the third special verdict, the verdict was not full enough to be judged treason as to them, because it only found that they were present, but found no act of *force* committed by them, and did not find that they were aiding or assisting to the rest. Yet Green is found to have been among them when they were doing the act of war, and throwing up his hat and hallooing with a staff in his hand ; and Bedel, being pursued by one of the soldiers, called out to the rest to face about and not to leave him.

Chief Justice. — They were acquitted because they might not have belonged to the party. The court added, " It is possible one may be present among such a rabble only out of curiosity to see ; and whether they were aiding or assisting is matter of fact, which ought to be expressly found by the jury."

Mr. Botts. — They were acquitted on the principle decided by yourself, that " war can only be levied by the employment of *actual force.*" You best know the opinion of the Supreme Court, and you have explained every part which remained doubtful, and, particularly, that it thought the actual employment of force necessary to constitute treason ; that *actual* force, or what is *equal* to it, was necessary in all cases for this purpose : for we admit, that from a part of the opinion of Chase and Iredell, *potential* force was sufficient. What was the case supposed by Mr. Hay ? That ten thousand unarmed men march to take possession of the Capitol of the United States ; the constituted authorities are intimidated ; the president and Congress fly before them ; the public offices are surrendered, and the government abandoned. This would be potential but not actual force. *Actual* must be distinguished from *constructive* force. Mr. Hay contends, properly, that this would be war. If it would, the opinion of the Supreme Court is wrong, and the gentleman must resist the authority of the chief justice as well as of the Supreme Court.

But the gentleman who spoke first for the prosecution

(Mr. Hay) says that certain qualifications were necessary to the opinion of the Supreme Court. If the definition which he has given us be sufficient, the opinion of the Supreme Court is incorrect. He thinks that it ought to be added to its opinion that the persons assembled for a treasonable purpose meant not to disperse; that if they assembled and did disperse, then they were not guilty of an act of war, although they might reassemble afterwards and accomplish their views. And Mr. Mac Rae says that another qualification is necessary: that it should not be a lawful assembly; that if it be a warlike, it should be an unlawful assembly. When gentlemen look at some expressions they should look at the other paragraphs to explain them. Compare the whole together, and you will find that the generality of the expression will meet and fit every part precisely. "Enlistments do not make war." "Troops must be embodied." A *bare assemblage* is not sufficient; but they must be troops. That they should assemble together as individuals is not sufficient. That they should do so after enlistment is not sufficient. They must be marched, and they must be organized before they can be said to be embodied as *troops*. Apply this, then, to the generality of the expressions relating to the assemblage, and you will find them precisely suited to convey the correct idea intended to be communicated: an assemblage of men not merely enlisted, but armed and organized as troops prepared to levy war.

It is true that the worthy gentleman who spoke yesterday has with great ingenuity discovered and informed us that every act of war did *not mean war*, but a soldier; that the constitution by the words "*levying war*" did not mean "*making war*" as it is generally understood, but *making a soldier;* that the meaning of the constitution in using the word "*war*" was a *soldier*. I do not wish to misrepresent what the gentleman said, but he certainly took up at least ten minutes on that single point; and the whole scope of his argument during that time was merely to show, and he did demonstrate with great ingenuity, that war was not war, but a soldier: so that levying of one soldier was levying war. If this argument be logical, there can be no question that war is not war, but logically speaking merely a soldier.

Permit me to refer to another Dictionary which I presume is as respectable an authority as that which the gentleman produced. [Here Mr. Botts read a passage from Ash's Dictionary, where, among several other significations, the verb "*lever*" means, as applied to war, "*raise*" or "*make*."]

So that "levy" means to *raise* or *make;* levy war means to make war. According to this Dictionary, to *levy war* means to make war; precisely as it is universally understood, and as common sense would have told us. That the convention who framed the constitution did not mean levying a soldier when they speak of levying war is evident. If they had meant so, they would in plain common words have pointed out the manifest distinction between levying a soldier and levying war. It is perfectly manifest that war *cannot be levied* till the war exist. The moment it existed it is levied, but it cannot possibly be levied till it does exist.

I did not think that it would be necessary under this government to enter into a discussion of the danger of constructive treason. I thought that from the experience of the British nation there was such a strong detestation of the doctrine of constructive treason that no person in this country could be found willing under any circumstances to approbate them; but that gentlemen of such respectable talents and such political principles as the gentlemen on the other side should advocate them is amusing, but, although almost incredible, is true. On this subject I will only trouble you by a reference to the opinions of the Supreme Court, your own opinion on the motion to commit the accused, and the sentiments of the celebrated author of the Spirit of Laws.

In the opinion delivered on the motion to commit the accused you observed that "as this is the most atrocious offence which can be committed against the political body, so it is the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous; and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the defini-

tion of this, but have themselves declared in their constitution that it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. This high crime consists of *overt acts* which must be proved by two witnesses, or by the confession of the party in open court." The opinion of the Supreme Court, so often referred to, states, that "the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentment, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion never fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide."

Montesquieu, in his Spirit of Laws, l. 12, ch. 7, says that this doctrine is sufficient to make any government degenerate into arbitrary power. The chapter is short, and in the words following: "It is determined by the laws of China, that whosoever shows any disrespect to the emperor is to be punished with death. As they do not mention in what this disrespect consists, everything may furnish a pretext to take away a man's life, and to exterminate any family whatsoever. Two persons of that country, who were employed to write the court gazette, having inserted some circumstances relating to a certain fact that was not true, it was pretended that to tell a lie in the court gazette was a disrespect shown to the court; in consequence of which they were put to death. A prince of the blood having inadvertently made some mark

on a memorial signed with the red pencil by the emperor, it was determined that he had behaved disrespectfully to the sovereign, which occasioned one of the most terrible persecutions against that family that ever was recorded in history. *If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power.*"

Hume, in his History of England, vol. v. page 31, 32, portrays in strong and proper colors the dangers of this destructive doctrine of constructive treason. Treating of the extraordinary means of violence and injustice resorted to for the destruction of the Earl of Strafford, he says, "Of all species of guilt the law of England had with the most scrupulous exactness defined that of treason; because on that side it was found most necessary to protect the subject against the violence of the king and his ministers. In the famous statute of Edward III., all the kinds of treason are enumerated, and every other crime besides such as are there expressly mentioned is carefully excluded from that appellation. But with regard to this guilt, *an endeavor to subvert the fundamental laws*, the statute of treasons is totally silent; and arbitrarily to introduce it into the fatal catalogue is itself a subversion of all laws, and under color of defending liberty reverses a statute the best calculated for the security of liberty that had ever been enacted by an English Parliament. As this species of treason discovered by the commons is entirely new and unknown to the laws, so is the species of proof by which they pretend to fix the guilt upon the prisoner. They have invented a kind of accumulative or constructive evidence, by which many actions either totally innocent in themselves, or criminal in a much inferior degree, shall, when united, amount to treason, and subject the person to the highest penalties inflicted by the law. A hasty and unguarded word, a rash and passionate action, assisted by the malevolent fancy of the accuser, and tortured by doubtful constructions, is transmuted into the deepest guilt; and the lives and fortunes of the whole nation, no longer protected by justice, are subjected to arbitrary will and pleasure."

It becomes now my duty to inquire into the correct definition of war. Many definitions are laid down by

writers. I shall insist on no particular definition; but all those which I shall trouble you with will show that the arguments used by the gentlemen on the other side are incorrect; that what they charge to be war will not apply to any of them.

Puffendorf, chap. i., page 8, describes it thus: "War is a state of men mutually engaged in opposing and repelling injuries." *Coke*, in his *First Institute*, 249, describes it thus: "When by invasion or rebellion the peaceable course of justice is stopped, then it is adjudged to be time of war." *Cunningham's Dictionary*, title *War*, the same.

The most comprehensive definition of levying war against the king or against the United States, which I have seen, requires an assemblage of men ready to act, and with intent to do some treasonable act, *and armed in a warlike manner*, or else assembled in such numbers as to supersede the necessity of arms. *National Intelligencer*, Feb. 17, 1807.

It is remarkable that the party, though charged with levying war, were not even ready to act. They could not make war till they were ready to effect it. Yet from the representations of the gentlemen on the other side, there must have been an actual war at Blannerhassett's Island or New Orleans. No case can be found in all the English books, and no case has ever yet occurred in this country, where any person was indicted for levying war when the party to which he belonged was not even ready to act. There are instances in which treason was adjudged, where the party was ready to act, but not a single solitary instance where a man was prosecuted for levying war when his party was not so much as ready to act. It was invariably the case in the year 1745. In every prosecution there was clear proof of an overt act. The form of pleading is always an evidence of what the law is. The form of the indictment furnishes what is to be found in the issue. If found guilty, it is stated that he is guilty in manner and form as he is charged in the indictment. If not guilty, found to be not guilty in manner and form as in pleading he hath pleaded: and the plea refers to the indictment, "that he is not guilty in manner and form as he is charged in the indictment." The record must speak

a technical language for both parties, or the proceedings will be irregular and illegal. It is indispensably necessary that the indictment should charge "that the party accused were *armed* and *arrayed* in a *warlike manner*, and did actually levy war. To prove this, I will merely refer your Honors to 1 *East*, 116, 117. 8 *State Trials*, 219, 267. *Foster*, 213, 214. In the last of which the substance of the form is set forth (which see before). It would not be sufficient to state a mere preparation for war. It must charge that it was actually levied; that is, that the prisoners were thus armed and did levy the war. Any indictment which would charge a mere *assemblage* without any more, without averring that they were armed and arrayed in a warlike manner, and levied war, would be vicious. It cannot be disputed that an indictment which omitted to charge that the accused were arrayed and armed in a warlike manner could not be supported. This is preparatory to, and must precede, the other and equally necessary charge that the accused did actually levy war. If, then, it would be fatal not to charge in the indictment that the party was arrayed and armed in a warlike manner, it is substance; it cannot be mere form; for if they consist of great numbers armed with crows, axes, and other such weapons, the indictment must so charge it. If it be not mere form, must it not be proved as a matter of substance? It must be even charged that the party intended and conspired to levy war; and then that he actually levied it. Is all this form? If it be substance, can a jury find it to be true when it is not proved to be true? Can it be reconciled to common sense that a prisoner should be charged only with the preparation of the war, instead of the war itself? that in a criminal prosecution, a rule deemed sacred in civil cases should be violated? that the charge against the accused should not be truly specified? If this were not a matter of substance necessary to be proved, why should all indictments for levying war contain those charges? What do all these indictments say? That the party prosecuted *prepared, ordained, and* LEVIED *war.* These are, then, matters of substance, and must be stated and proved.

We come back now to the *constitution* which we have

established. That the convention, who framed it, by controlling the national legislature from defining this crime, intended to prevent them from extending the doctrine of constructive treason, knowing the pernicious and dreadful effects it had produced in other countries, — and that the legislature had the same object in controlling the judiciary in construing the treason cannot be doubted. It declares that no man shall be convicted but on the evidence of two witnesses, and that treason shall consist in *levying* war, &c. This valuable provision in the constitution is expressed, I should suppose, in very plain terms, concerning the import of which there could be no doubt in the mind of any man. What is the meaning of the word *war* used in the constitution of the United States? There is, I believe, no word in the English language so generally understood as this word is. There is no word more familiar to the minds of men in general; as contrasted to peace, it is understood by everybody. But still there is no word that will admit less of a uniform standard of signification to express its various meanings from the highest to the lowest — a diversity which has been already noticed, from its technical, legal definition to its popular and ordinary acceptation. It is understood by all men, from the most enlightened to the plainest. The question is, whether the word be intended in the popular, ordinary sense, or according to the English books, Littleton, Coke, or even the doctrine of the bloody Jeffreys, which makes an act of hospitality and kindness an act of war. What, then, is its interpretation as used in the constitution? Is it intended to be understood in the popular, ordinary sense as understood by all men? or in a technical sense? or according to the rules of philology? I should suppose that that very enlightened body, the convention, had consulted philology as well as common parlance, the technical as well as the popular sense; and as they were fixing the guilt of treason in levying war, and prescribing a rule of conduct to the people, and the punishment for its violation, they meant it in the ordinary, popular sense, because it would be far better understood, being intelligible to all men. Whereas its technical definition used in courts is known but to few. I should suppose that they did not intend to

use it according to the old English books, by which it may mean anything and everything. By which a mere act of liberality or kindness, as a meal's victuals or a night's lodgings might mean, when expounded by such men as Jeffreys, an act of war and treason, punishable with death, as was done in the case of the unfortunate Lady Lisle.

What acts are acts of war are questions of law, and consequently to be decided by the court. (See 1 *East*, 66, 67. *Fries's Trial*, 174, 175.) The law must be uniform, and not fluctuate with different opinions of different juries. But we are told that we are robbing the jury of their rights ; that is a question compounded of fact and law ; that the decision of the whole question belongs to the jury ; and that to decide in favor of our motion would be an encroachment on their "acknowledged and peculiar province." I am sorry to find these illiberal attempts, used by gentlemen repeatedly, to infuse into the minds of the jury prejudices against the court. The counsel seem to think that the jury are cannibals hungry for human life, waiting with impatience for the feast ; and that the moment the precious morsel is prepared to be raised to their lips, you are about to snatch it from them. The country is alarmed that the trial by jury is to be destroyed, and that the court at their pleasure is undertaking to usurp their exclusive rights. You are often reminded that the treason is compounded of fact and law, and that the jury are to decide on both. It is true that it is compounded of fact and law, and that the jury have a right to decide the whole question ; but it is equally true that it is the right and duty of the court to decide every question and point of law arising before it. But whenever a judge undertakes to decide on the *weight* of evidence or the *credibility* of witnesses, then he assumes to himself what belongs to the jury. The court cannot decide on the weight of evidence, nor is it requested to do it now. And should some future Jeffreys arise and put in exeeution the power which the court is now about to exercise, he will not thereln transcend his duty or power. To usurp the rights of the jury, he must take upon himself to decide that the witnesses who deposed have deposed truly or untruly. The facts are

made up by their own testimony, but those facts, as they appear on the face of them, we admit to be in verity; and when the verity of the proof is admitted, it is like a special verdict, where the jury find all the facts, and refer the decision of the law arising thereon to the court. Why is it that the court has the exclusive right to determine the true construction or legal import of a deed? Because the fact cannot be controverted. The instrument speaks for itself. Its verity is not in issue; and the court therefore can decide on its import.

In a civil case, when the testimony is exhibited by the plaintiff, whenever the defendant chooses to demur to it, he may do so. He admits every fact stated to be true, and every just inference from it; but says that they are not *in law* sufficient to support the plaintiff's claim as stated in the issue. So in criminal cases, the reason is the same. Every principle which holds with respect to demurrers in civil cases prevails in criminal cases in this form. The facts proved or offered by either party are admitted, and their legal effect and sufficiency referred to the court. On what principle can it be said that you have not the same right to draw an inference in criminal cases that you have in civil cases? I shall not contend that the jury may not decide in opposition to you; but this does not show that the court has not a right to give its opinion, but evinces the indispensable necessity of demurring to the evidence, in order to secure an observance of the law; and when it is demurred to, it must be decided by the court. This is far from being an invasion of the rights of the jury, as has been often improperly averred by the gentlemen on the other side. It is only the just exercise of the power and due performance of the duty of the court; and in the distribution of the constitutional powers, it is as necessary for the public interest that the court should discharge its duties as that the jury should perform theirs. It is not the *weight*, but the *legal effect*, of evidence that the court is to decide on.

Let us suppose the acts of an *accessory* about to be introduced in evidence against a party on his trial. If the accessorial testimony be in law inadmissible in the case, it is the duty of the counsel for the prisoner to oppose its introduction; of course, admitting its verity in

point of fact, but denying its relevancy in law. Yet the counsel for the prosecution would say that this opposition would be taking from the jury a part of the case exclusively belonging to them. The question in such case would be, whether the connection between the prisoner and the accessory were sufficiently proved. If it were, the accessorial evidence would be admissible; otherwise it would not. That would be a case where, if the connection between the parties were not proved, it would be the duty of the court to protect the accused by excluding from the jury evidence which the law forbade to be given against him. This doctrine is laid down by *East*, 96, 97: "As it happens more frequently in trials for this than for any other offence, that the acts of some of the conspirators in the absence of the others are given in evidence against them, it may be worth a more particular inquiry in what manner the rule is applied. In this as in other cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by express evidence of the fact of a previous conspiracy together, or a concurrent knowledge and approbation of each other's acts. But it may also be done by evidence of the acts of the prisoner and of any other with whom he is attempted to be connected, concurring together and to the same purpose or particular object." "But when the connection between the parties by one or other of the means above mentioned is once established, *of which the court must in the first instance judge previous to the admission of any consequential evidence to affect the prisoner by acts of others to which he was not a party or privy*, then whatever is done in pursuance of that conspiracy by one of the conspirators, though unknown, perhaps, to the rest at the time, is to be considered as the act of all."

Now, sir, there is no difference of legal principle between that case where it was determined that the court was to judge of the *sufficiency* of the direct testimony to

prove the connection between the parties before any consequential evidence should be introduced, and this case, where the admissibility of other evidence depends on the *sufficiency* of the previous proof of the overt act. In both cases the admission of the consequential evidence depends on the *sufficiency* of the preliminary or direct proof; and as the court has the right to decide on *that* sufficiency in the one case, so no objection can be made in point of principle to its exercise of it in the other.

But, sir, in the same book, pages 66, 67, Mr. East is supposed to hold a different language; that it is a question of fact to be tried by the jury under all the circumstances. I do not suppose that any person would deny that the question of *treason* or *no treason*, or of *war* or *no war*, is to be decided by a jury. But whenever a question of law arises, the court must decide it. Whenever a demurrer to the indictment or evidence renders a decision of the law necessary, then the business of the judge is to determine it. Whenever the accused submits his case to a jury, he must submit it according to the rules prescribed by the law with respect to evidence and proceedings on trials; and if the jury had found the facts in special verdict, referring the decision of the law to the court, still the whole question of war or no war may be said to be decided by the jury; for they presented to the court the statement of facts which they deemed correct, and by it the court must decide. The court only decides on legal questions incidentally occurring in the cause, but the jury must find a verdict, whatever opinions the court may have given. But though the question, whether treason have been committed, or whether war have been levied or not, is to be determined by the jury exclusively, yet the question what facts amount to treason or constitute war, is always a legal question to be determined by the court. It only describes what acts proved or admitted will amount to acts of war. If it be contended that the court has not this right, then gentlemen will begin a war among themselves. Mr. Hay says that the opinion of the Supreme Court is to control this court; and that it was proper for that court to say what treason was. If opposed in this by Mr. Wirt and Mr. Mac Rae, their gladiatorial power in this instance turns from the

prisoner to themselves. Those gentlemen contend that whenever treason is the question, the jury must consider of it; but he contends that whenever it is the question, the court must consider it. Mr. Wickham put a very strong and very apt case, the case of a principal and agent in a civil case; that his character of agent is to be introduced before any proof of an act to bind his principal. The person who attempts the introduction of this testimony to bind the principal must first prove that there was a delegation of authority from the principal to the agent. Mr. Wirt knew this doctrine to be correct, but he endeavored to elude its effect by saying, that when the question is *made*, the court has no right to say whether the delegation be made out or not; that the jury must decide it. I deny the correctness of the gentleman's assertion. Does not the court call on the party to prove the actual delegation of authority? He must prove by one witness that there was a delegation of authority. Whether the witness merit credence or not, whether he ought to be believed or not, is to be decided by the jury alone; but the principle that no dependent testimony shall be admitted till the principal evidence be produced is determinable only by the court; and if the party offer the dependent testimony before he introduce the principal testimony, the court has the right to exclude it, and will do so, till the principal evidence shall have been brought forward. This is not interfering with the rights of the jury. Instances are very common in which the court interferes to exclude dependent evidence till the principal evidence be first introduced. Yet few cases are reported, which makes the doctrine appear more intricate.

But I will mention a case infinitely stronger than the cases already spoken of. It is a case from one of our own courts. I mean the case of Gatewood, who was indicted for murder in the District Court of Fredericksburg. On his trial, his counsel offered evidence of brutal indecencies with which the deceased had insulted the wife and daughter of the prisoner in his absence. The indignities were of such loathsome and shocking complexion, and were preceded by threats of such a deadly nature, as to fill the bosom of the husband and father equally with

apprehensions and durable resentment. The prosecutor objected to the testimony because nearly twenty hours had transpired between the provocation and the murder, during which the passions had an opportunity of subsiding. The counsel for the defence took nearly the same course that those for the United States here pursue; and they, being the advocates of a man upon trial for his life, were indulged with a patient hearing. They urged that Gatewood's apprehensions and passions would naturally revive on seeing the object of them after cooling time had passed; and aware that if the jury could once be inflamed by a rehearsal of the provocation, their feelings would secure an illegal verdict, they pressed upon the court the right of the jury to judge of all the testimony, to decide on the weight and sufficiency of the testimony touching the cooling time, and what should be allowed for cooling time under all the circumstances that induced the choler. They said more than would have been endured from counsel unfavored by the privileges with which humanity to prisoners clothes their advocates. Yet I believe no temper was then manifested to drive the court into compliance by depicting the dangers of suppressing evidence, as judging of it has here been called. Two judges of characters, both ranking high in that class of politics to which the counsel on the other side profess to belong, both regarding the jury trial under its legal restrictions as the noblest security for freedom, both careful to preserve it from impurities by sustaining the powers which were vested in them to regulate the evidence before it, excluded what was offered. The court there judged of the weight of testimony touching cooling time. It *determined* what time should be allowed, and *rejected*, or, if you please to use the degrading language now so fashionable, *suppressed*, the evidence so adjudged to be illegal, and improper to be confided to the jury. I have in my hands, from the files of the executive, what will prove this case to be correctly stated. The judges in Gatewood's case have not since been vilified, because they were of our political cast, and because no current ran against the effect of their opinion.

But this principle of the power of the court with respect to what is malice or not, is laid down in 2 *Mac Nally*. 547, in his third rule concerning malice.

"But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction the law putteth upon the facts stated and agreed or found by a jury is in this case, as in all other cases, undoubtedly the proper province of the court." Cites *Foster*, 257.

As in The King *v.* Major John Oneley, indicted for the murder of William Gower, Esq., Raymond, J., after argument on a special argument, laid down this proposition, to which all the judges agreed: "That the *court are the judges of the malice*, and *not the jury;* and that the court are also judges of the fact found by the jury, whether, if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not."

This case, then, comes expressly within this rule of criminal law: that admitting the facts to be true, it is the proper province of the court to decide on them. It is strange that we should be obliged to prove that the question, what acts are acts of war, belongs to the court, as the books are full of cases which go to show this universal principle: that whenever a statute creates or defines an offence, the construction of that statute belongs to the court; and what facts, when proved, will amount to that offence, is a question of law. What are false pretences under the statute against that offence, is a question of law to be determined by the court. See *Leach*, 422, *case* 30. What are false tokens is a question belonging to the court; for which I refer you to 2*d Strange*, 1127; 2 *Hawkins*, 321 (*note*). In these cases it will be seen to have been settled that what amounts to a false token under the statute is to be decided by the court. The offence of profane swearing, prohibited under certain penalties, is also to be construed by the court. In 1 *Strange*, 497–8, certain persons were convicted in the inferior court for having used particular expressions deemed to be profane swearing. The conviction was carried up by *certiorari*, and the Court of King's Bench decided that it was a question of law what amounted to a violation of this statute. In like manner the decisions have been on the statute of gaming; that what acts amount to gaming in violating

the statute are questions of law to be decided by the court. This appears from many cases well known to the court, but is particularly laid down in *Burrow*, v. 2471; and it was said to be a universal principle that what acts constituted an offence under any statute belonged to the court; that whether the facts, when proved, would amount to the offence, was considered as a question of law.

In this instance I want to know what facts the jury are to inquire of but those spoken of by the witnesses. If we were now to submit the case to the jury, there is an inquiry to be made of nothing but the truth of those facts which have been deposed to. Well, when we admit the truth of these facts, there is nothing for the jury to act upon. When the prisoner gives up everything that relates to the correctness and sufficiency of the testimony, when he admits everything but the mere question of law, and when the court, from its constitution and nature, decides questions of law, I ask you, what rational objection can be made against our motion? But if the decision of this question were referred to the jury, any man, on a question of law, may reverse your opinion. In a civil case, a jury may find in opposition to your opinion, but you can control their verdict by granting a new trial.

We have been told that we boasted that we were ready, and we were asked, if Colonel Burr were not guilty, why we would not hear the evidence. Hours have been spent in warm and animated declamation by the counsel. The prejudices which were so generally and zealously excited in the country were resorted to in court. Even Colonel Burr's counsel have not escaped censure. Many harsh observations were made, as if gentlemen were under the influence of personal displeasure. But I mean nothing disparaging in these observations. Motives of personal respect would restrain me. I do not ascribe his conduct to any want of patriotism or correctness, but to his situation as counsel under the influence of zeal. Even in England, instead of odium being attached to counsel for appearing in defence of persons accused of treason, gentlemen distinguished by their zeal for the liberties of their country frequently defend them without incurring such illiberal imputations. But we are told that the

people ought to hear the evidence, and asked why they should not. The answer is contained in the remarks on College's trial, by Sir John Hawle, 4 *State Trials*, 173. They show that the people may be misled, and that injustice may be sometimes popular. He was cruelly and shamefully treated. He was refused counsel except to betray him. Counsel were assigned him for that purpose, which they did. He was refused a copy of the indictment, and of the panel of the jury, till he should plead. All his papers, his very notes by which he was to defend himself, were seized, and taken from him. Illegal evidence was admitted against him. Some of his witnesses were imprisoned, and others intimidated from appearing in his favor. The court, instead of acting as his counsel, leaned against him. "But he had more reason to complain of the injustice of the court in summing up the evidence against him. They did it in such a manner, that if they had been counsel for the prisoner, as they pretended, they would have been justly suspected to have taken a fee of the other side to betray their client." "They took away all helps from him for defending himself; and therefore they had as good have condemned him without a trial." Yet "the cry of the auditory was great against him and his witnesses."

It is not that we wish to exclude the testimony from public view. The worthy gentlemen have rendered *that* impossible. The evidence against Colonel Burr has been published a thousand times to the world by the prosecutor; but the evidence in his favor was not published. The people will lose no benefit by your excluding the evidence. They read the newspapers, in which it has been all so often published with the most cruel and unfounded exaggerations, while no part of the testimony in favor of Colonel Burr has ever been published. So that prejudice has its full scope; and he has to resist its impressions, however heavy they may be. In this state of the public mind, and while there is a train of no fewer than one hundred and forty witnesses against him, some of whom at least well deserve to be suspected of a willingness to commit perjury, Colonel Burr's counsel would betray their trust were they not to oppose the introduction of all illegal testimony whatsoever. Nor ought those who conduct

the prosecution to complain, as he is willing that the public statement of facts made by the counsel themselves should be taken for granted.

But Mr. Hay told us that constructive treasons in this country would not be dangerous; that in Europe the doctrine is dangerous, but not in the United States, because we have a government in which the people are sovereigns; and the people will not persecute themselves. But is there no danger of perjury and subornation, of faction and party spirit, of unjust persecution? I can never take the liberty to speak a syllable against the character of a witness regularly introduced (not actively *volunteering* in aid of the prosecution), whose conduct has been fair, and deserves no harsh imputation; but I cannot be guilty of any injury, if a witness have perjured himself, and I am prepared to show it. If specific facts can fix this charge without the possibility of doubt, and if the evidence of such a witness were to be received without examination or opposition, without any inquiry into his character or conduct, the doctrine of constructive treason might be made to apply universally.

As tenderness for character gives the preference in argument to a supposed over a real case, I will suppose a case, instead of taking up our own. I would not be understood to make an allusion to it, but merely to illustrate it. I will suppose that we had a real grounded apprehension of an approaching war with a neighboring and powerful nation, which has several millions of inhabitants capable of military service. I will suppose that we had a feeble army in the neighborhood of the boundary line between the two countries, and that our general had marching orders to fall back, as he had not perhaps a twentieth part of the force against him, and expected to be attacked by the superior army of that nation. I will suppose that the populous and rich city of New Orleans, the key to the Mississippi, was in danger of invasion. I will suppose that the provinces of this hostile nation adjacent to our territories are very extensive, fertile, and opulent, but oppressed by political bondage. I will suppose that a hero, distinguished for military science and valor, and as patriotic as he is ambitious of honorable fame, but whose good name was blighted and blasted by

the malice of his countrymen, should have seen the dangers hanging over this country; New Orleans threatened with invasion and conquest by a Spanish force, our citizens there in danger of murder or captivity, their wives and daughters ready to be a prey to Spanish lust, and all else in that now favorite country exposed to desolation. I will suppose that this hero knew that a band of faithful patriots could be collected immediately round his standard. I will suppose, that with this band of patriots, he should at this fortunate and critical moment have rescued the country, the army, and the people by a seasonable relief to the decrepit and half-baffled forces of the United States. I will suppose, that in the same magnanimous spirit, he should after this have gone on in his enterprise to establish the independence of the Mexicans, and give liberty to millions now groaning under bondage. Suppose he had done all this, he would have acquired immortal glory, and be renowned in future ages as the deliverer of his country, worshipped as its idol, and called its savior, as Washington was. Yes, sir, the highest merit of this doubly glorious achievement would have been his; but all those who had performed any part in it would have been hailed as the benefactors of mankind.

But I will suppose that the man whose views and plans I have described was basely betrayed and thwarted; that when he was ready to accomplish all these things, he was prevented by perfidy and treachery. Let it be conceived that a military officer, the commander-in-chief opposed to the Spanish army, is treacherous and perfidious, void of all principle, capable of everything that is profligate. I will suppose that this officer, jealous of the glory to be acquired by this hero from the success of this enterprise, and urged by the most malignant motives, determines to defeat it, though planned in concert with himself, transforms it into an accusation of treason against the United States, and converts the whole to his own advantage; that he avails himself of the exaggerated reports of the numbers engaged in it to patch up a precipitate treaty with the Spanish commandant, and at the trifling expense of sacrificing his friend, and betraying his conscience, ingratiates himself into favor as well with the hostile government as his own! I will suppose that he infuses

poison into the executive ear by secret denunciations of the governor and judges and other respectable characters, and that he informs the executive that that country is in a state of disaffection. I will suppose that the very sources from which the executive could get correct information are stopped by this very man; that the president of the United States, a great and good man, anxious for the safety of his country, believes that the people of New Orleans are really disaffected, because this man who announces them as such has, by his many lawless acts of tyranny, made them such. I will suppose that the morality of this virtuous president would compel him to feel it his duty to take violent measures in so desperate a case, especially if he believed the representations of the newspapers, which increased the number of the party from eighty to seven thousand; that having no possible means of knowing the true state of facts, and being of an easy temper, he gave full credence to this man's statements. I will suppose, that from his misrepresentations, and probably at his desire, an effort was made to suspend the writ of *habeas corpus* in the legislature of the nation, but proved abortive in the House of Representatives; and subsequent events have shown that there existed no cause whatsoever for suspending it. We will suppose that this military character takes to himself the power arbitrarily and indiscriminately to arrest and imprison the people, as it were, in a mass, to subvert the civil authority by resisting the writ of *habeas corpus* issued to rescue those whom he had tyrannically imprisoned, to introduce martial law to facilitate and strengthen his despotism, and to begin and continue the violation and robbery of the post offices, and cut off every possibility of information of what was passing. I will suppose further that the military chief, having denounced in the newspapers and everywhere the very person who was planning with him how to accomplish the great object I have been speaking of, devises every mode of getting at, creating, and extorting testimony to justify his illegal and arbitrary proceedings; that hope and fear, terror and promises, rewards and punishments, are all used. I will suppose that he has twenty or thirty precursors employed in different parts of the country to adopt all possible modes of procuring and creating testi-

mony, and that he has made all these persons interested in procuring this testimony. I will suppose, that notwithstanding all these things, a grand jury proceed to inquire into the offences he has committed; when three of the popular counsel employed to prosecute other accused persons immediately eulogize this commander-in-chief, and, by their perseverance and zeal, stop the inquiry, and stifle the prosecution against him. I will suppose that this, an extraordinary spectacle, such as was never seen before, and is agreed to be anomalous in criminal justice, was going on in a room of this Capitol, where the grand jury were deliberating on the subject. I will suppose that the patriotism of this president of the United States, whose ear is thus poisoned by this man, should excite him to reflect that desperate cases may require desperate remedies, and to institute inquisitions in every part of the United States for the discovery and procurement of evidence. Each of the officials of this inquisition calls on individuals to discover treason. These officials are directed to impose themselves as bosom friends on those from whom they may wish to draw the secrets of the mind, and thus, under the guise of friendship, they steal the secrets of the heart. I will suppose that the expectation of patronage and promotion to office and distinction facilitate the procurement of this species of evidence. I will suppose that every man who has these motives is applied to, and induced to tell his *ex parte* tale; a full inquiry is not solicited. The inquiry is only pressed on one side, but it confines and trammels the witness. It will confront him at a future day. The influence of hope and fear has a great effect on his mind. I shall suppose that the illustrious man at the head of our affairs, whose name is a host from merited popularity, was alarmed, and convinced of the truth of the imputation against the accused, and pronounced him, in the face of the world, to be certainly guilty; and that his expressions would have the effect of a fact with every person; that it would be generally believed that the president had good authority for pronouncing him to be guilty; while, on the other hand, the mantle of the president's opinion protects this military chief. "The honor of a soldier and the fidelity of a good citizen," ascribed to him

by that opinion, have their effect of preventing a proper scrutiny into his misconduct. I will suppose that two eminent counsel of great ability and influence have been selected to aid the public accuser (which, however legal, is unusual). I will suppose, that from the representations made to them, and the view they have taken of the case, they believe the individual accused is guilty; that the case, being desperate, requires desperate means. They have therefore indulged in coarse, popular declamation against the accused; and they add the weight of their opinions by declaring the convictions of their own minds as to his guilt. I will further suppose, that it being a matter concluded upon all hands that his conviction must take place, they have seized and illegally confiscated all his property, and thereby deprived him of the means of defence (for has it not been proved that Colonel Burr's boats and property have been seized?). I will suppose that these gentlemen think proper to connect the guilt of the accused with the credit of the government; that it has not only been said here, but published in all the newspapers throughout the United States, that if Aaron Burr should be acquitted, it will be the severest satire on the government; and that the people are called upon to support the government by the conviction of Colonel Burr. I will suppose that (perhaps through inadvertence) they vilify, revile him, and degrade him; that one of them represents him as sunk in dust and ashes; and even jurymen have been taught by the common example to insult him. He must submit to all this; but I will not suppose that any person will say that it is an act of magnanimity thus to treat a person bound hand and foot and sunk in dust and ashes; nor will I say that anything in this is policy. Christ himself was abused, was mocked and spit on. Why should not a mere mortal man be in like manner abused? But I will suppose, that if the accused were to display an invincibleness of soul, a heroism, a tranquil patience and forbearance during all this time, and under all these circumstances; that he should exhibit himself uniformly placid and serene; I should not suppose from these manifestations that he was a traitor. I would suppose another case, an accident, and which it would be only necessary to mention — a most interesting scene to

have been witnessed. When the grand jury returned a true bill, he was firm, serene, unmoved, composed; no change of countenance; the most tranquil equanimity prevailed in every feature; his soul at peace with itself and with its God. Yet the next day they announced in the newspapers that he was in a state of indescribable consternation and dismay. But this is but a small part of the long catalogue of misrepresentations which have been practised for the purpose of prejudicing his cause. I will suppose that every man who dares to look at the accused with a smile, or present him the hand of friendship, should be denounced as a traitor; that his friends are persecuted and hunted down. I will suppose, that on some of the witnesses for the United States, perjury could be proved; that this perjury could be proved, among others, by some other witnesses summoned for the prosecution; but that the attorney for the United States has discharged these latter from further attendance. I will suppose that there are thirty or forty witnesses who will probably impeach the veracity of the only witnesses on the part of the prosecution who undertake to prove any acts of force or violence by the people on the island. I will also suppose that on the one hand it is difficult and inconvenient for the accused to procure evidence; that those who dare to show a disposition to give evidence for him are discouraged, censured, intimidated; but on the other, a liberal treasury of the United States, the patronage of the government and all the officers of the government, over an extensive territory, are enlisted in getting evidence to be exhibited against one man, and that man imprisoned, and without property, and without the ordinary means of obtaining testimony or information, by the obstructions of the mail. I have seen a letter from a respectable gentleman in New York stating that the mail at New Orleans was broken open, and letters taken therefrom; and other post offices have been violated. I will say, that if, while we have such a virtuous president, an administration so distinguished for talents and virtue, such enormous offences be committed, if such atrocious practices take place with impunity under such an administration, nothing can save the constitution. But let us come to another case. Let us suppose, what is not impossible, that we should hereafter

have a vicious president; what could he not do with all the finances of the state at his command? What may they not do if the doctrine of constructive treason be left to their guidance? This is a power that *may* be exercised by either a virtuous or vicious president. But though it *may* be exercised, it is improper for any president to do so. But I do not mean to admit that the president is bound, or has even a right, to interfere in any prosecution whatever. On the contrary, I insist that the president's interference with the prosecution is improper, illegal, and unconstitutional. From the very moment that a case enters into the pale of the judiciary, he ought to avoid all interference with it. What law gives him the power? The constitution gives him the power to repel invasions and suppress insurrections. It gives power to Congress to do so; and he is to execute the laws made by Congress for these purposes. He is therefore to suppress insurrections; but the very moment that an insurgent is taken before the judiciary, the two departments become distinct, and he has no right to interfere; if he do interfere, he violates the constitution. He has a pardoning power, which is utterly incompatible with any interference with the prosecuting power; and *zeal* to conduct it is naturally begotten and increased with those who take part in a prosecution. If the president enter the lists with the attorney of the United States, if he direct a prosecution to be conducted, he becomes anxious and decisively zealous for the conviction; and this anxiety and this zeal affect his ability to judge of the propriety of pardoning. He makes himself as unfit to judge of and dispense mercy as the attorney who prosecutes. This interference has been, in ancient times, the bane of liberty in England; but there the king is the sovereign, and prosecutes; whereas here the people are the sovereign, and the United States prosecute. Yet neither the king nor the counsel have the right to interfere to any extent in the decision of causes either civil or criminal. *De Lolme*, in his treatise on the constitution of England, page 88, says, that though the king is the first magistrate, yet "he can make no change in the maxims and forms consecrated by law or custom. He cannot even influence, in any case whatsoever, the decision of causes

between subject and subject; and James I., assisting at the trial of a cause, was reminded by the judge that he could deliver no opinion. Lastly, though crimes are prosecuted in his name, he cannot refuse to lend it to any particular persons who have complaints to prefer." And in the index it is stated as a general sentiment that neither the king nor the privy council have the right to interfere with the decision of causes either civil or criminal. Whether this authority be correct to the extent here stated or not is immaterial. The king is the prosecutor there. The president does not stand in the same situation here; nor ought he to possess or exercise such a power. The same vices and malignant passions which actuate a tyrannical king might actuate a tyrannical president.

I have no doubt the president acted from good motives, without sufficiently reflecting on the subject, and that he has inadvertently followed one of the very worst British examples in the most arbitrary reigns. I wish Mr. Jefferson were here by your side, and could hear what could be said on the subject. I am confident he would determine that he had done wrong.

There is a great inequality between the prosecution and defence, when the president affords executive means to carry on the former, whereas justice requires that there should be an equality between them. Is not the interest of the public engaged in defending as well as prosecuting? Is it not as much for the public good that innocence should be protected as that guilt should be punished? The law arms the prosecutor in this country with ample means to carry into effect the prosecution. His means are equal to those exercised in England. Why should not Congress interfere as well as the president? The three departments of the government are separate and distinct by the constitution. None of them should go beyond its constitutional limits by encroaching on the other; and it is particularly essential to the security and happiness of the people that the judiciary should be independent.

It never can be admitted that the executive authority by its military or other agents can arrest and imprison the citizens at its pleasure, resist and subvert the civil

authority, and violate the sacred channels of communication between the people. But I do not mean to impeach the motives of the president, but to regret that he has committed a mistake by which the most pernicious doctrine has been introduced. I beg pardon for this digression. I will go on with the suppositions on constructive treasons.

I will now suppose that there is a little spot in the country secluded from all others by geographical boundaries (at a great and most inconvenient distance from hence) from which the jury to try the accused should come; but that in this little spot the people had expressed themselves, and were well known to be, peculiarly hostile to the accused. I will suppose that the accused urged for himself that this is the only spot from which an impartial jury could not, from their avowed sentiments, be expected to come; and that as the provision of the law, which requires all trials to be by an impartial jury of the county as well as the state or district where the offence shall have been committed, is for the benefit of the person accused; if he waived that benefit, it was unnecessary to summon a jury from thence; that from the great distance it might be desirable to avoid the expense of summoning a jury from that county when they might be summoned from a much shorter distance from the state at large. I will suppose that the court was satisfied that if the parties agreed, the summoning of the jury from that county might be dispensed with; but that the counsel for the prosecution insisted that the jury should come from that place so strongly prejudiced against the accused, notwithstanding his waiver and the opinion of the court. I will suppose that the marshal is admonished to summon such a jury as will not commit the government; such a jury, I suppose, as would not satirize the government by an acquittal. A prejudiced witness is deputed to summon the jury from Wood. He vacates two state offices for the purpose of contributing to hang what he calls a traitor. He selects the best friends of the government, and everywhere expresses his opinions. On discovering that this was illegal, a new deputy does the business. He goes to the agent of the government for a list of names, and summons by mistake ten out of the twelve who had been summoned by the witness de-

puted. These men, having signalized themselves by their hostility to the accused, could not of course be accepted. I shall suppose that the marshal depends for his very official existence on the executive authority; but this marshal is as good a man as ever existed, but that he was distinctly apprised that if he *did not take care* and summon such *men as would not satirize the government*, he should be removed from office; that the marshal knew these political distinctions, and summoned, out of the thirty-six to be selected from the state at large, thirty-four of the political sentiments of the president and other members of the administration. I will suppose that these thirty-six were under insensible influence and prejudice against the accused; and most of the *whole* were members of assembly and popular men representing the president's sentiments. He is relieved from such a jury by the constitution of his country. (See also *Christian's Notes to Bl. Com.*, p. 85.) He is obliged to barter away his constitutional right of three days' time before pleading in order to have a speedy trial. If all these suppositions be realities, we may be destroyed by constructive treason, if improper evidence be admitted by us. If all these things be true, our safety depends on the exclusion of irrelevant and illegal testimony. But there is one answer to be given to all reasoning on this subject: It is clear that without attending to the principles of our constitution there may be a subversion of our liberties. We are told that the virtue of the people will do everything; that the voice of the people must be heard, and must decide where they are sovereign; that the voice of the people is the voice of God; and that a majority of the people must always do right. That the voice of the people is like the voice of God in many cases, that the people have a capacity to govern themselves, that their rights are inviolable, and that the majority must decide to make laws for the whole, must be admitted; but I hope the gentleman will not go beyond that; that he will not refer the fate of individuals accused to the sudden and violent impulse of their feelings and passions; for the people are sometimes hurried into the most dreadful excesses, led away by their passions, though their sentiments are just, or seduced by the arts of de-

signing and influential men. There are cases where individuals have been sacrificed by the voice of the people: Socrates was made to drink hemlock, and Aristides was banished by the people. Though innocent and the best friends of the people, they were destroyed to appease the resentment of the people; and Admiral Byng was made to die for the same cause. Jefferson was run down in the year 1780 by the voice of the people. Reformation and Christianity itself prove the general errors subject to pervade the people. Jesus Christ himself was crucified by the people. The violence of the people is sometimes irresistible in the worst of causes. The storm must go by. I know that the most respectable and intelligent men in the world are sometimes wrong, and commit acts of imprudence and injustice. If constructive treason be not excluded, however patriotic and moderate the people and government may be, the sensible remark of Montesquieu may be verified even in the United States, and it may make the government arbitrary. A portion of the people will reflect, and see the effects of former excesses, and become sensible of errors which have been the source of so many injuries, but the rest will not. Factions will arise; these will be extinguished by constructive treasons; and these last succeeded by despotism; so that the doctrine, if adopted and practised here, may do more mischief than the rotten boroughs of England, with their system of bribery and corruption, have done.

I am sorry for having taken up so much of the court's time, but I must make a few more remarks, and notice some observations of the counsel on the other side; if the court will bear with me, I shall endeavor to be as concise as possible.

Mr. Mac Rae says that Colonel Burr is not an accessory, but a principal, in the treason, and that the overt acts were wherever he did anything; and he asks us, "Must he not be tried at least where he did those acts?" But we contend that all his acts, if he did any, are merely accessorial; and it is not shown that he has committed any act in person, or in which he ought to be considered a principal actor. The gentleman has read Throgmorton's case fully. That was the only case in which it was

attempted to prosecute in the first instance an absentee as a principal actor; but the prosecution failed. Instead of reasoning in vindication of the principle of such an attempt, he has only shown some circumstances in which that case and this differ, but which do not affect the principle in the least. He says that we are allowed books, and to argue questions of law, which privileges were refused to Throgmorton. Thanks to the justice of the court for *that;* the gentlemen have worked hard to prevent the court from hearing us.

But the gentleman complains loudly that one of their witnesses has been driven from his post. He exonerates, however, the counsel of the accused from any participation in his desertion. This fellow attempted to raise an insurrection, and was driven away by his apprehension of an affidavit proving his guilt. It is a pity that the gentleman had not got him to keep sober till he should come to this court. It is a pity that the fellow had not been found in a bed which he should not have been in, and that he had not been whaled for it from the crown of his head to the soles of his feet. I could furnish the gentleman with several amusing anecdotes of this kind for his next edition of waiting. I think they ought to drive most of the blackguards away for the credit of the prosecution.

[Here some very facetious and pleasant remarks passed between Mr. Botts and Mr. Mac Rae, which afforded amusement for the moment, but are omitted as irrelevant to the report.]

Mr. Mac Rae says that the accused has no fewer than four attorneys general and two subaltern counsel to defend him, whereas Throgmorton had no counsel. I apprehend that in an affair of war,* one brigadier general will be equal to four attorneys general; and they have a lieutenant governor (Mr. Mac Rae) who by virtue of his office is connected with war, and is a military man, equal to the other counsel of the accused. The law allows but one counsel to the United States. It allows two to the accused at public expense. They have three

* Major Wirt had during the last session of the general assembly been in nomination for the office of brigadier general, and had a respectable number of votes.

times as many counsel as the law allows. The laws of this country know but one attorney for the United States. As they have three, we ought, according to the principle of the law and the rule of proportion, to have six, the four attorneys general and two subaltern counsel at the public expense. The interest of the United States is to procure an acquittal where the imputation of guilt is not merited, as well as to procure conviction where guilt exists; and humanity goes with sound policy in furnishing the means of full defence as well as of a prosecution.

Mr. Wickham has been charged with advocating the influence of the common law in the United States at one time and resisting its introduction at another. How can this imputation be justified? When a general phrase of a technical import, or a particular legal meaning, is used, you must refer to the source from whence it is derived in order to ascertain the idea and find out the true meaning; consequently where a technical phrase or expression borrowed from the common law is used in the constitution or any law, the common law must be consulted, in order that the phrase may be used in the sense in which it is known to the common law; but certainly the use of some of its technical phrases, or the adoption of some of its ideas, is very different from the adoption of the common law itself. They tell us that a majority of the judges of the United States are of a different opinion; and that what they say is law. Now, apply their own meaning. If war were a word of technical meaning, to what source do you apply to ascertain its import? If it be a word of technical meaning, you look at belligerent states or books on tactics. If it be not a word of technical meaning, it must be taken in the acceptation in which it is universally understood by the people. Why do not gentlemen come out at once, and say that the common law does or does not exist? It is in force in the different states as a part of the state system, with different modifications, but it does not apply to the constitution of the United States. While they thus charge Mr. Wickham, how is it with them? are they perfectly consistent?

I hope neither Mr. Mac Rae nor Mr. Wirt will take any-

thing I say amiss. For many reasons, I wish to demean myself in no other way but that of the utmost respect towards the counsel and the court. Almost every man has his mind influenced in some degree by his zeal in the cause in which he is engaged. It may be a matter of complaint that so much time should be consumed in adulation towards the president and General Wilkinson. If this adulation in his professional character had gone no farther, if he had merely advocated *them*, I should probably have been silent on the subject; but it was contrasted with the grossest abuse of my client. That adulation seems to have furnished them with an opportunity of reviling the accused, and to have been used as a foil to reflect the brilliancy of their characters. Were it not for this, I would not take upon myself the right of complaining of their adulation at the expense of two or three hours' time. Yet he complains heavily of us, that when we are brought hither, we turn ourselves accusers, exhibiting a reversal of the nature and order of things, so as to satisfy his mind most perfectly that we are wrong and that he is right.

It was very wrong for certain persons in Ireland who were accusers to be accused! It was a very common thing to see such cases. Sir Charles Asgill, Major Sir, and Mr. O'Brien, all of whom were persons who had brought accusations against others, were accused themselves. Two of them were not only accused by the accused, but proved to be guilty. It was not a marvellous thing to occur, in the course of a prosecution during the troubles in that country, for a person prosecuted to accuse those who had sworn against him as witnesses. The castle was frequently accused. But he complains that the government has been reproached.

It is true that some gentlemen associated with me, and who differ from me on political subjects, have been under the necessity of expressing their opinions freely of the unjust treatment of the accused, by the agents of the government; and one of them has opened his mind freely as to the conduct of the government itself. Mr. Martin has a right to speak of the government as he thinks its acts deserve. Its transactions are a proper subject of inquiry and criticism; a principle in which the

gentlemen on the other side indulge themselves without restraint. Freedom of inquiry is indeed our own principle and Jefferson's, which endears it to us all. There is a perfect toleration in the United States. Mr. Wirt began by saying that he would not plant a thorn in his own heart to rankle there for life by assisting in an unjust prosecution. I wish gentlemen would not make such professions. I believe them to be sincere, but the world will consider them as mere declarations made by them as counsel, and not as men ; it will contrast them with their extreme ardor and zeal in the prosecution. Though they would do nothing but what they thought perfectly justifiable, yet the *fanaticism* that prevails in the prosecution beguiles them perpetually into acts which are at war with their professions, and which they would abhor if they could take an impartial view and were sensible of them : such professions, therefore, will serve no substantial purpose.

Mr. Wirt attempts to produce, in conflict with Mr. Wickham's argument, Mr. Randolph's prayer to "save us from the deductions of common sense." This was but a feeble attempt to pervert Mr. Randolph's obvious meaning. It was *Mr. Hay's kind of common sense*, as explained in his argument, which Mr. Randolph deprecated, and which he endeavored to prove to be repugnant to real common sense.

The proof of the overt act intended by Mr. Wirt is the enlisting of men by Aaron Burr's officers in Pennsylvania. But Mr. Hay says they were enlisted for a purpose of which the plan was to be imparted to them at the mouth of Cumberland. He said enough to tell us that not one of these persons who went down from Blannerhassett's Island knew for what purpose they were going, but it was to have been disclosed to them at the mouth of Cumberland. Mr. Mac Rae omits to make any comment on this part, and therefore admits it. I wish him to make out a case, and show us, *where* any men were enlisted before they came to Blannerhassett's Island. No assemblage was necessary, according to his argument.

What does Mr. Wirt say in opposition to the *confession* of Mr. Hay, and the tacit admission of Mr. Mac Rae ? He

tells you, this court, this jury, and this people, that Colonel Burr's officers had *enlisted* those men in Pennsylvania and on the island. If they were *enlisted*, they must have known for what purpose they were engaged and who engaged them, or under what leader they were to serve. We were at the mercy of gentlemen, but I did not expect that the gentleman would have used the power to say that they were ready to prove a fact which he knew had no existence, and enlisted himself among counsel who have the character of not speaking with sincerity.

Mr. Wirt explained, that he thought himself authorized to draw the conclusion which he had expressed, because the men in the boats, who went to the island, were then *called*, and *considered themselves*, Burr's men ; and at the mouth of the Cumberland he called them *his men.*

Here a desultory conversation ensued between Mr. Botts and Mr. Wirt, in which some warm and animated observations were made respecting the evidence and Mr. Wirt's comments thereon.

The *Chief Justice* observed that the evidence was such that different gentlemen might draw different inferences from it.

Their warmth then subsided, and their former amity and good humor returned, and Mr. Botts proceeded with his argument.

Mr. Wirt contends, that *even* enlisting soldiers amounts to levying war ; but that certainly bringing them together constitutes that crime. This, however, is inconsistent with Mr. Hay's definition, which requires an assemblage convened to effect a treasonable purpose before their dispersion. In England, enlisting men is sufficient to constitute an overt act of treason, in compassing the king's death, because the intention is the offence ; the crime consists in the imagination. But where the crime does not consist in the intention, but in war, there nothing merely preparatory to, or short of, an act of war will suffice. "But the potential force was intended to operate, and did operate, on New Orleans, or on the people of Wood." I have already shown that there is not a shadow of a pretext for alleging that there was any potential force to alarm the inhabitants of Wood County. As to New Orleans, the party was never in a state ready to

act. Their circumstances, situation, and want of preparation and of force, all show that they were far from being ready to act, whatever intentions they might have entertained ; and, therefore, potential force did not operate on New Orleans.

I hope, sir, I have proved my first proposition (and which of itself ought to be deemed decisive if established), that the acts proved to have taken place on the island were not in themselves acts of war, and that no intention could make them so.

I proceed now to my second proposition, that the accessorial agent cannot be convicted until the record of the conviction or outlawry of the actor be produced.

In addition to the authorities already referred to by us, I will refer you to *Gilbert's Law of Evidence*, Loft's edition, 863, 864. The absurdity of convicting the accessory when the principal may be acquitted is most glaring. One great reason which produced this rule in England, that the principal should be convicted before the accessory, was, that the accessory has no right to involve himself in a defence which the principal alone can make. No man is as well acquainted with the circumstances of an act, or the point on which it depends, as the principal engaged in the act itself.

Mr. Wirt has admitted that if Colonel Burr be not a principal actor in the war itself, he cannot be convicted till the record of the conviction of the principal shall be produced. Whether he be principal or accessory, wherever he acted, there he must necessarily be tried. If he be an actor, where did he act ? and where is he to be tried ? If we were to concede their own arguments to the fullest extent, it is impossible that Colonel Burr can be rightly tried in Virginia. If he is to be tried in Virginia, is our country in war ?

Mr. Wirt says that Colonel Burr was to these people what the sun is to the planetary system ; that he gave them their life, and heat, and motion. But the gentleman has adduced no proof whatever in support of this comprehensive assertion. He has shown no guilt on the part of any of the persons accused ; and if they moved in their respective orbits, he is not shown to have directed their motions. If they had life and heat, it is not proved

that they derived any portion of either from this luminary.

He has drawn a frightful picture, and endeavored to apply it to Colonel Burr; but there is no resemblance. But by these arts he endeavors to avoid and get round the real question. Whether a man be principal or accessory does not depend on the degree of moral turpitude, but on the question in what great class he must be put. No doubt the accessory is, in point of moral turpitude, as guilty as the principal when the act is really committed; and much more so where it is not, as far as intention can constitute guilt.

If a man advise an act of desperation to be committed, as a cruel murder, and it be committed, there is no doubt he who advised would be as guilty as he who perpetrated the act. But suppose the agent or party advised had been himself killed, there would be no comparison between the guilt of the adviser and the person who did the act. The latter would be innocent, as acting in self-defence, but the former guilty of having prompted the agent to an act which led to his destruction. Suppose the agent exceeds the orders he receives, the person who commanded him is not more responsible than if he had not acted at all. In every case of an atrocious crime proved by one person to be committed by another, the record of the conviction of the actual actor must be produced before the accessorial agent or procurer can be tried; because, in the nature of things, the guilt of the one depends on that of the other. If the one be innocent, the other cannot be guilty; derivative guilt is always dependent on principal guilt. But where the offence is of much less moral turpitude, the law may be otherwise.

I think the second point is most clearly established. I have only made these few remarks in addition to what was said before on our side. I deemed it, indeed, too clear to require further elucidation; though my duty, more than any difficulty created by the arguments of the gentlemen who prosecute, rendered it proper that I should bestow some attention on it.

The third point which I have proposed to maintain is, that no evidence of an accessorial agency can be

given on this indictment, charging the accused as an actor.

The object of pleading in civil cases, and of indictments in criminal cases, is to apprise the defendant or the accused of the points on which he is to make his defence. It is a principle universally known and admitted. The purpose of a declaration is to inform the defendant of the point which he must be prepared to controvert. This principle is well explained and decided in the *2d volume of Judge Washington's Reports*, 179, in the case of Overton and Wife, administrator and administratrix of Hanley, *v.* Hudson, executor of Hudson. It was an action for money had and received. The money was received by an agent, a deputy sheriff; but the person who was bound by the act of the agent was improperly sued; that is, the high sheriff was bound, and his executor was sued. But the declaration declared generally that the money which the deputy had in fact received had been had and received by the high sheriff. It was contended for the claimant, that as the high sheriff was bound by the acts of his deputy, it was, in law, his receipt; and as this was a kind of an equitable action, it ought to be sufficient to charge him generally. But it was held by the Court of Appeals (affirming the judgment of the District Court) that there should have been a specification in the declaration of the particular act of the agent by which the principal became bound; and that it was not sufficient to charge the act done in reality by the agent as committed by the principal because the principal was in law bound by it. And it was observed by the court that "the great object of pleading is to apprise the contending parties of the real subject of dispute. Without it, they may be entrapped at the trial, and real injustice may be produced."

The principle of that case is precisely the same as the principle of this. In that civil case, the court was unanimous in affirming the opinion of another respectable court, and determining that a principal could not be made liable for the *act* of his agent, charged generally as *his* act, and not as the act of the agent. So a general indictment, charging the prisoner with assembling with persons unknown on Blannerhassett's Island, and making war, cannot answer the only end of one, to apprise the prisoner

that a question whether he wrote a letter, for example, twenty years ago, in Massachusetts, is to be litigated; though such indictment may well put him off his guard by removing all suspicion of such question, and by luring him to an extensive preparation for another.

The same principle is determined in *1st Cull's Reports* of the decision of the same court, page 104, in the case of Chichester *v.* Vass, where it was said by Pendleton, the president, that "every declaration ought to be drawn so as to answer two essential purposes: first, to convey sufficient notice to the defendant upon what points he is to defend himself; second, to enable the defendant, if cast, to plead that recovery in bar to another action for the same thing."

It is laid down in *2d Hawkins*, 320, that "it is generally a good rule in indictments that '*the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indictors have not gone upon insufficient premises.*'"

The precedents in criminal prosecutions are all special. In Lord Audley's case, which was remarkable (there was, in fact, three indictments against him, one for aiding to commit a rape on his own wife, and the other two for sodomy), the charge was very special. 1 *State Trials*, 328. The indictment against Algernon Sidney, 3 *State Trials*, 794, is very special also. It charges him, not only generally with having compassed the king's death, but also with having assembled and consulted with other traitors to treat of the execution of other treasonable acts; with having promised to aid and assist them in the execution of their treasons; and with having sent one Aaron Smith to Scotland to invite and procure divers persons to come from thence into England to consult with him and other traitors of aid and assistance to be supplied from Scotland to reduce to effect those treasons in England.

In the *Crown Circuit Companion*, 448, 449, the form of an indictment against the principal murderers by shooting with a pistol, and against the aiders and assisters, is set forth. It first specially states the *manner* in which, and the instrument wherewith, the principal perpetrated the fact, and then avers that the aiders and assisters were present, aiding, abetting, assisting, &c., the principal to

commit the murder, particularly charging, according to the truth of the case, the part which each of the prisoners took in the commission of the crime. But according to the doctrines of the counsel for the prosecution, all the accused persons might have been charged generally with having committed the murder, because all of them were present, acting and aiding, and of course principals.

Now, sir, is it possible that a man could be apprised of the point to be urged against him on his trial from an indictment charging that he made war in Blannerhassett's Island, when the witnesses say he was three hundred miles distant from that place? Now, sir, suppose the ground of accusation against Colonel Burr to be, that he procured and counselled the treason to be committed by a letter written by him for that purpose; and suppose that he was in Great Britain when he wrote that letter; and that his only act had been the writing of that letter; would the present indictment, charging him as an *actor* in the treason on the island, apprise Colonel Burr that he was an accessorial agent when he wrote that letter, and must be prepared to defend himself against acts committed by others in pursuance of that letter? Unquestionably, it would not. How, then, can a man come to trial, informed of an accessorial act, and prepared to disprove it, on this indictment? That case and this are the same in principle. The form just referred to from the Circuit Companion shows, that where the aiders and abettors are *present at the act*, their act of aiding must be specially set forth; and the case referred to by Mr. Wickham, from *Tremaine*, 4, shows that the particular act in the aiding must be set out, where the abettor *was not present at the act*. So that, whether absent or present, the act of aiding and abetting must be specially set forth. In addition to the cases to which we have already referred, I beg leave to mention the doctrines in *Leach*, from page 422 to 430, to show the necessity of a specification. The fourth proposition which I mean to support is, that *none but actors in a war can be traitors in the United States;* and consequently that accessorial agents in a war are not punishable as traitors. The plain words of the constitution are against the *leviers* of war *only:* "Treason against the United States shall consist *only* in levying

war against them, or in adhering to their enemies, giving them aid and comfort." Procuring a war to be levied is a different offence from levying the war. It may be objected that the English statutes of treason, in treating of the treason of levying war, were by construction applied to abettors. To this I answer, that the acts or statutes of treason in England were ingrafted upon the principles of the common law. The statutes in England did not originate treasons, but restrained them. Originally treason consisted of principal acting and accessorial acting in the perpetration of that crime. The statute took away a branch of the crime which existed at common law. *Tucker's Blackstone, 4th vol., appendix* B, *p.* 16, 17, 18, *and section* 23, 24, 25, *and* 26, *and notes to page* 17, explains this subject with great perspicuity. Judge Tucker, having in page 16 observed that it seemed to have been taken for granted that the clause in our constitution which relates to the crime of treason is an exact transcript from the *statute* 25 *E. III.*, quotes that statute *verbatim*, in order to compare them, and to show this to be a mistake, and then proceeds thus: "Upon this statute, we may remark *that there are no negative words* in it, as in the constitution of the United States; and that so far from declaring, as that does, that treason shall consist *only* in the cases enumerated, it expressly supposes that many other cases of treason may happen, although the framers of that statute could not then think of them.* True it is, such cases were to be reserved for the king and Parliament to pass upon; but the violence of succeeding times, and the corruption and complying temper of succeeding Parliaments, during a succession of more than two centuries, left but little room for scrupulous judges, had there been any such in those days, to apply for a parliamentary interpretation of any undefined offence supposed to be treason."†

* "You are deceived to conclude all treasons to be by the statute 25 E. III., for that statute is but a declaration of certain treasons which were treasons before at the common law. Even so there doth remain divers other treasons at this day at the common law, which be not expressed by that statute, as the judges can declare." Per *Stanford, State Trials*, i. 72.

† See the statutes 21 *R. II.* iii.; 3 *H. VII.* xiv.; 26 *H. VIII.* xiii.; 28 *H. VIII.* vii.; 1 *Edw. VI.* xii.; 3 and 4 *Edw. VI.* v.; 1 and 2 *P.*

Sir Matthew Hale, having enumerated several instances of arbitrary and unjust decisions respecting treasons, thus proceeds: "By these and the like instances that might be given, it appears how uncertain and arbitrary the crime of treason was before the statute 25 Edw. III., whereby it came to pass that almost every offence that was, or seemed to be, a breach of the faith and allegiance due to the king, was by construction and consequence and interpretation raised into the offence of high treason. . . . And we need," he proceeds, "no greater instance of this multiplication of constructive treasons than the troublesome reign of Richard II.; which though it were after the limitation of treasons by the statute 25 Edw. III., whom he immediately succeeded, yet things were so carried by factions and parties in this king's reign that this statute was little observed; but as this or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of the party that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if, indeed, the statute of Edward III. had not been made or in force. And though most of those judgments and declarations were made in Parliament (sometimes by the king, lords, and commons; sometimes by the lords, and afterwards enacted as laws; sometimes by a plenipotentiary power committed by acts of Parliament to particular lords and others), yet the inconvenience that grew thereby, and the great uncertainty that happened from the same, were exceedingly pernicious to the king and kingdom." Whereas the constitution and the act of Congress *originate* the crime of the *actors* in the war, *and negative all others.*

In England, the restraining acts relating to principals necessarily extended to accessories; for accessories cannot be more guilty than their principals. Here I beg

& M. viii. ix. x.; 1 *Eliz.* v.; 13 *Eliz.* xiv.; 14 *Eliz.* i.; 23 *Eliz.* ii.; with many others, whereby so many pains were ordained by statute, "*That no man knew what he ought to know, or to do, or to say, or to speak, through doubt of such pain.*" See preamble to *statute* 1 *H. IV.* And that judges were not less complying than Parliaments, the histories of those times fully prove. See 1 *Hale's Hist. P. C.*, 84, 115, 119, 120, 121, &c., *and the State Trials passim.*

leave to refer again to the authority of the same learned judge, concerning whom it gives me pleasure to declare that I respect his public character and talents no less than I esteem and admire his virtues in private life. In *pages* 19 and 20 of the same *appendix*, he says, "Again, in England it is agreed on all hands that all such as counsel, conspire, aid, or abet the committing of any treason *ex parte ante*, whether present or absent, are principals; and that in all treasons except that which concerns the great or privy seal or money, whosoever knowingly receives, maintains, or comforts a traitor is a principal in high treason. And this upon the construction of the statute 25 Edw. III." I refer your honors also to pages 40, 41, 42, 43, 44, and 47 of the same *appendix* [which see before in first volume, quoted by Mr. Wickham].

At a very early period of English jurisprudence, it was made a question whether, when a statute created a new felony, the incidents of a felony at common law inhered in it. It was deemed a question of some difficulty, but the courts decided, that when the offence which is created a felony by the statute is proved to the court, the statute shall be taken in reference to the common law; that if the statute speak generally of offenders, the accessorial offenders shall be comprehended. Thus, if any act were made felony by a statute which was not so at common law, the accessorial would follow the principal acts, though accessories were not named; and the aider, abettor, adviser, receiver, and comforter of any person who should commit such an act would be punishable like the actors.

A question afterwards occurred, whether when a statute has taken away the benefit of clergy from any offence, it have taken it away from the aiders, abettors, procurers, &c., before, and receivers and comforters after, the fact. It was determined, that where a statute took away the benefit of clergy from an offence which was not felony at common law, it did not take it away from the aiders and other accessories unless it was taken away in express words; that the deprivation from them could not be effected by implication. To show this to have been the case, and to prove the humane principle, which judges adhered to in the construction of highly penal statutes, that they always construed them liberally and strictly, I will refer to

several passages from *Foster*, in *pages* 355, 356, 357. The subject will be better understood by reading the whole together, although part of it has been read already in the course of the trial. Treating of new felonies created by statutes, which take away clergy from those who shall be guilty in the manner therein set forth, without *express* mention of aiders and abettors, *or any words which manifestly extend to them*, and of the question whether mere aiders and abettors should be ousted of clergy by such statutes (which question he considers as deserving of great consideration), he says, thus the judges have been extremely tender in the construction of such statutes, and that, with respect to the *allowance* or *non-allowance* of clergy, they have carefully distinguished between principals in the first and second degree, the actual perpetrators and the mere aiders and abettors, and then proceeds: "In the case of the King against Page and Harwood (*Allen*, 43; *Stiles*, 86), upon the statute of stabbing, which enacted, that 'if any man shall stab or thrust,' &c., the defendants were present, aiding and abetting, a third person, not named (by the reporters), who in fact did make the thrust, was denied his clergy; but the defendants, though agreed to have been principals in manslaughter at common law, were admitted to their clergy. For though, in judgment of law, every one present and aiding is a principal, yet in the construction of this statute which is so penal, it shall be extended only to such as *really and actually made the thrust, not to those who, in construction of law only, may be said to make it.*" This case is cited with approbation by Hale and Holt, and was never yet denied to be law. The same rule prevailed in the case of Evans and Finch, upon the statute of 39 Eliz., against robbery in dwelling-houses. They both put up a ladder against the chamber window. Evans opened the window, got into the chamber, and stole £40. Finch stood on the ladder in the view of Evans, saw him in the chamber, assisted in the robbery, and had a share of the booty, *but did not enter the chamber;* and upon that account *alone*, he, though plainly a principal present and abetting, had his clergy; and Evans had judgment of death. For, saith Hale, after citing this case, "it must be a stealing in the house; and therefore he that stealeth, or is party

to the stealing, being out of the house, is not ousted of his clergy.

"Thus stood the law with regard to this statute, and to 56 E. VI., against an offence of the like kind, till, by 3 and 4 W. and M., aiders and abettors were expressly ousted." The same rule of construction did always govern, and doth to this day govern, in the case of larceny *clam et secrete a persona,* upon the statute 8th Eliz. The person who actually *picketh the pocket* is ousted, not he who is present aiding and abetting. Though without some accomplice ready at hand to take off the booty, this sort of theft seldom succeedeth, for, saith Hale, this statute shall be taken literally.

I will now apply these cases which I think have hitherto stood the test and criticism of all succeeding times to the present question. Page and Harwood were undoubtedly principals in the manslaughter; the thrust made by him who was denied his clergy was, in construction of law, made by every man present and abetting. Finch was likewise a principal in the robbery; the entry of Evans was, in construction of law, the entry of Finch. It is so held every day in the case of burglary, at common law, where an actual entry of some kind or other is equally necessary. Why, therefore, did not a constructive thrust in one case and a constructive entry in the other operate so as to oust the accomplices present and abetting of clergy? The reason is plain, and hath been already hinted at; the judges were upon the construction of statutes very penal, which were to be taken literally and strictly; aiders and abettors are not named or described, and therefore could not, as they conceived, be brought within the statutes. Foster then adds that the construction constantly upon the statutes, ousting clergy in murder, robbery, rape, and burglary, hath been different; and that aiders and abettors present have been always ousted, and ought to be, but that the cases differ widely. In those, aiders and abettors are not once named nor described by any terms importing that the legislature intended to oust them; but in the other cases, terms are used which are well known to include them; and clergy is taken away from offences severally described by legal *technical terms of well-known signification,* as *murder,*

robbery, rape, and burglary; and that aiders and abettors were liable to be convicted as principals in those offences.

I consider it as undeniably established, that when a statute takes away the benefit of clergy from an offence which was felony at common law, unless this deprivation is *expressly* effected by the words of the statute, it cannot be extended to aiders and abettors or receivers by inference or implication. The principle is the same in the case of piracy mentioned by Mr. Wickham, where the act of Congress ordains the punishment of accessories before the act to be death, and of accessories after the act to be fine and imprisonment. If Congress had thought that the accessories would have been punishable, they would not have taken the trouble of making these provisions. Where the common law was not in force, a new statutory felony will not include accessories. But the common law was not in force in the United States, or on the seas; therefore a new statutory offence in the United States would not include accessories without expressly naming them. Accessories pursue the common law; and a new statute that would declare that a particular act should be from thenceforward felony would only embrace the actors, but no accessorial agent. Why should not the same construction be put on the constitution and the act of Congress? When the constitution was formed, the United States had no common law; did they begin by giving common-law incidents to the offences which they created? Congress certainly did not intend to provide against any incidental offences in providing against the principal offence; because they have, in the same statute, defined all the incidental offences expressly, and prescribed separate punishments for them. For example, misprision is incidental at the common law to treason and to felony; yet we find the act of Congress providing separate punishments for both these offences. The second section of the act of Congress, *1st vol. Laws of United States,* 100, punishes misprision of treason with a fine not exceeding a thousand dollars and imprisonment not exceeding seven years; and in the sixth section of the same act, page 102, misprision of felony is punished by a fine not exceeding five hundred dollars and imprisonment not exceeding three years; and accessories before and after the fact in

felony are punishable by sections 10, 11, 13, 14, 15, 16, 17, and 18.

I understood Mr. Mac Rae to have said that receivers of traitors could not be considered as accessories to treason punishable as traitors; and I understood Mr. Wirt as saying that the common law as to accessories after the fact was in force when Congress legislated. What would be the effect of Mr. Mac Rae's admission? If the common law to which they are incident be not in force in the United States, neither are accessories before or after the fact. But if the common law were in force, how could it make accessories before the fact criminal, and those after the fact innocent? Why should this partition be made on the subject, leaving one half of the accessorial offences in force and the other not in force?

Let us examine Mr. Wirt's view of the subject, and see whether it be more correct. If the common law were in force when Congress legislated, there was such an offence as an accessory after the fact, as an incident to treason at common law; but if the common law were not in force, it is impossible that such an offence could have existed.

By the twenty-third section of that act, the rescuer of a convicted traitor is punishable with death; and the rescuer of a person committed, but not convicted of treason, is to be fined not exceeding five hundred dollars, and to be imprisoned not exceeding one year. Now, if the accessorial agents were traitors by the constitution, as the counsel for the prosecution strenuously contend, the Congress could not have differed the offence and punishment of the rescuing accessory from those of the principal; yet the *rescuer*, instead of being punished with death, is punished only with fine and imprisonment.

The act of Congress having provided no punishment for accessories in treasons, except rescuers in the two cases before stated, it follows as a necessary consequence, if Mr. Wirt's argument be correct, or the common law be in force, except so far as repealed by that provision, that while the rescuer who has used force to break open a prison has resisted the administration of justice, and, but for that repeal, would by the common law be hanged, is only fined and imprisoned in a moderate degree, while a mere receiver, who, like Lady Lisle, only does an act of

hospitality as giving a breakfast or a night's lodging, is to suffer an ignominious death. It is really, sir, a most important and necessary inquiry, whether it could have been possible that Congress could have intended so unnatural, unjust, and preposterous a distinction, as to punish lightly an enormous offender, and to punish capitally a most trivial and harmless offender. But, sir, I cannot think it possible that they could have intended it so. To admit the possibility is to do them great injustice.

It is a rule at the common law, that if a statute go on to create a new felony, and declare that the principal actors and their aiders or *some* other accessories shall be felons, but omit one particular class, all the accessories named shall be included in the statute, and punished accordingly; but the particular class of accessorial agents which are omitted shall be excluded. 1 *Hale*, 235, 236. "If an act of Parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereunto shall suffer as traitors, this doth not make receivers or comforters after the fact guilty of treason; for *expressum facit cessare tacitum.*" "If an offence be made treason in the offender, his procurers, counsellors, abettors, consenters (without the word *thereunto*), yet it seems to me, for the same reason, it doth not make the knowing receivers traitors, unless the word *receivers* or *comforters* be also inserted." This is the case at law. The constitution and the act of Congress taken together have only made two offences: the actors in the treason and rescuers of the traitors. The act of Congress has defined what treason shall be in the words of the constitution. It punishes the principal acts and certain accessorial acts, and must necessarily exclude all other accessorial acts. If accessorial offences by virtue of a union between the statute and common law be incidental to felonies created by statute in the United States, then deodands are incident to statutory felonies here.

But if the offence of the accessory were included in the constitutional provision, there are no means of punishing it. He must, by the express terms of the constitution, be tried in the district where he has committed the crime. He cannot be tried but where he has committed it. Where, then, is the accused here to be tried?

He cannot be tried in this district, because he did not do the accessorial act within it. He cannot be tried in another district, because the accessorial act is dependent on the act in the other state. *Vid.* 1 *Hale*, 623. 4 *Tucker's Bl.* 303, *do. appendix, note* B, 50, 51. *Kelyng*, 15, *and* 3*d article of the Constitution.* In addition to which, I shall read part of the argument of Mr. Bradford, late attorney general of the United States in the prosecution against Mitchell, reported in 2 *Dallas*, 354, which is a candid exposition of the law, and entitled to respect as coming from the prosecutor.

"To render any man criminal," says he, "he *must not only have been present, but he must have taken part with the insurgents.*"

The constitution may protect a man during whose life there has been no rebellion; but after a rebellion, any man in the United States may be convicted by proving his declarations. What advantage could I derive from the constitution requiring two overt acts, if Mr. Hay were to charge me with co-operating in the western insurrection of 1794? Could I deny the overt act? Of what benefit would the constitution be to any citizen if he can, though absent, be connected with a rebellion by mere declarations? Are its provisions to be got round and evaded in this way? A whimsical case is mentioned by Mr. Mac Rae in order to prove that Colonel Burr ought to be considered as present at the scene of the overt act. He states the case of a house with four rooms, and a man killed in one of the rooms by some persons while the rest of the same party are in the other rooms of the house. He says that in that case all are considered as present where the murder was committed and principals in it; as well those who were in the other rooms of the house as the actual perpetrators of it; and Mr. Mac Rae supposes the United States converted into a sort of a *palatial* house with seventeen rooms, each state forming a room; Massachusetts being one room, New York another, Virginia a third room, Kentucky a fourth, &c.; and he contends that a man who is in any one of these seventeen rooms may be as much *present* in any of the other sixteen as a man in one of the four rooms could be deemed to be present in any of the other three rooms.

This is far from being an extravagant comparison. This seventeen-room house is so convenient for one part of the family to step from one room to another at a moment's warning, to assist in any operations carrying on by another!

Suppose the accessorial agent and the whole transaction to be in Great Britain; that whole country would not make so great a *palatial* house as this seventeen-room house. There have been many cases of accessorial agents in treason and felony there; and the books containing the doctrine make a conspicuous figure in the library of every lawyer; yet such a doctrine as this was never heard of; that the whole country might be considered as one theatre of action! If this had been the law there would have been no accessories at all. No such doctrine as that of accessorial agency would have been treated of in the books. All would have been principals. This new argument of gentlemen destroys *all distinctions of remoteness* and *proximity*, of *absence* and *presence*, of *principal* and *accessory*. I know of no case where there can be an accessorial agent, if a man in Georgia shall by construction be said to be present in New Hampshire.

Then he put the case of the park as another instance to justify this argument: that because when a murder is committed in one part of a park, those who are about in another part of it, but of the same party, are considered as present and principals in the murder. Colonel Burr, in Kentucky, may be presumed to have been on Blannerhassett's Island, in this state; and he asks with exultation, whether the accused did not send the men on the island, warning to take care of the *Philistines*. He supposes that Colonel Burr might have given warning to the people with a very *loud* voice, to beware of the Philistines. And as it was only one hundred and seventy miles off, he might have been easily heard! This equals the shooting at New Orleans from the island! a giant in the history of *Tom Thumb* or *Jack the Giant-killer*, He went one hundred and seventy miles at a step, as far as Caliban in the Arabian Tales (which I suppose the gentleman had read). What is the principle which constitutes *legal* presence in the cases cited by Mr. Mac Rae

and Mr. Wirt? Sufficient proximity to give *immediate assistance* to the actor. Wherever the person who was not the immediate *actor* was ready to give *immediate assistance* to the *actor*, there he was *legally* present, though *actually* at some *convenient* distance; but where he is not near enough to give *immediate* assistanee to the actor, there he is not *legally* present, but an accessory. This principle is as plain and intelligible as it is reasonable; but the arguments of gentlemen have no sort of application to it.

As to the argument of Hume Campbell, no reliance was placed on it as an authority. There was a mere reference to the general doctrine as he was not contradicted by the court; and the decision of the case against him, and in favor of the prisoners, was on a ground wholly unconnected with the doctrine in question.

The next case mentioned by Mr. Mac Rae is that of David and Uriah the Hittite, *Foster*, 362. That authority is decidedly against him. It says, indeed, that in "*foro cœli*" David was the murderer of Uriah. But the author goes on and asks, "Is it also true in *foro seculi?*" (Is he considered such by the human as well as the divine law?) He answers, "*By no means.* For in the eye of the law, the offences of principal and accessory specifically differ, and fall under a quite different consideration." Now, are we in *foro cœli* or *foro seculi?*

Mr. Wirt supposes that a man in Boston procures another to go to Georgia to commit murder, or a man in one extremity of the continent to procure the perpetration of murder at the other. Who is the guiltiest? One is punishable as principal, and the other as accessory; the latter to be prosecuted after the former shall have been convicted. That is the common case of principal and accessory mentioned in the books. This is the legal distinction; and on the grounds of *reason* and *moral right* they are equally guilty.

The gentleman supposes another case of two men coming from Campbell County to kill a man in this city. One goes to Manchester; the other comes to the capital. The latter assassinates the intended victim; and he asks whether the man who went to Manchester would not be as guilty as he who committed the murder in Richmond.

I answer, that in "*foro seculi*" he would not be guilty at all. He would not be more guilty than if the offence had never been committed. According to the gentleman's own statement, the man who went to Manchester would not be punishable at all by the laws of this country. No precedent can be adduced to show that he would be punishable. Though in *foro cæli*, in point of turpitude of intention, he would be as guilty as the actual murderer.

Then the gentleman produced authority, 3*d Institute*, p. 9, to show that if many do conspire to levy war, and some do levy it, all are principals in the treason ; and several quotations from Hale and Foster in support of the general principle, that in treason all are principals.

The gentleman's argument is founded in a mistake, in confounding *war* and *treason* in the English cases together. The treason in England consisted in the intention : conspiring to levy war was the offence. They were principals in the treason of compassing the death of the king (the form in which it is most generally prosecuted), but not in levying the war. But it is not so here. The war must be actually levied here. The crime there consists in the intention of the mind in every case.

Chief Justice. — Not in cases of levying war. The principal or accessory in any case of levying war must be proved to have participated in levying war.

Mr. Botts. — I do not controvert that. I mean every case of compassing the king's death. Though there are many cases of indictments for treason, where the indictee was charged with conspiring war, yet I believe there is no case where the evidence went to charge him with levying war, unless he was actually present. They can produce no instance where a party really absent has been prosecuted as a principal on an indictment for levying war. The general practice would be sufficient, exclusive of the reasons to control any inference from the cases of constructive presence on which gentlemen rely as authority ; and an additional argument against them entitled to some respect is, that while they have been able to adduce so many cases of *legal* presence in felony, all their industry has not enabled them to find out one case of *legal* or constructive presence admitted in treason ; and it may be safely affirmed that none such exists.

The country is much indebted to Judge Tucker for his valuable and laborious researches on this subject. They have thrown new light on it, and must be of great utility in all future prosecutions. He has with no less ability than industry explained the nature and dangers of constructive treasons, and drawn the line between constitutional treasons and arbitrary and constructive treasons. He has given a clew to the truth, which will be more valuable to those who are in pursuit of it, than perhaps all the law books which have treated on this doctrine taken together.

The gentleman (after having stated that the nature of the transactions must furnish the degree of proximity, and after having endeavored by arguments and authority to justify the conclusion that Colonel Burr, when in fact in Kentucky, was legally on Blannerhassett's Island), concluded by telling you that you must apply the cases in the books to the case before the court. A very hard and difficult task indeed! It was not liberal to devolve it upon the court, for it was too formidable for him to undertake it himself. There is no resemblance in principle between those cases and this. They admit of no analogy or inference in favor of his argument. That the difficulty is insurmountable will be at once seen by the court. To its decision I cheerfully submit.

He then asks you whether the jury might not find a verdict against your opinion. Yes, sir, a jury may in every case decide against the opinion of the court. In the present cases, where the court clearly expounds the law to a jury, they may conclude against the exposition of the court. They may find against law and evidence. But this does not prove that the court should relinquish its rights or fail to perform its duties. If the jury in the conscientious discharge of their duties may involuntarily err, it does not justify the court in wilful error.

I must, sir, as I have detained the court so long, omit many other observations which I intended to make in answer to the counsel for the prosecution; but I flatter myself that I have established to the satisfaction of the court *all* the four propositions which I submitted to it. But the establishment of any one of them would be sufficient for our defence; for if the acts on the island were not acts

of war, then there can be no evidence to support the indictment; as there is no record of the conviction or outlawry of the actor, the accused cannot be convicted; and if there were such a record, according to my third proposition, it could be no evidence under this indictment charging the accused as an actor; and if, according to my fourth point, an accessorial agent in a war be not punishable in the United States, there is no foundation for the prosecution. I confidently hope, therefore, that our motion to prevent the introduction of irrelevant testimony will be granted. I beg pardon of the court for having trespassed so long on its patience, and thank it for polite attention.

Mr. Hay then addressed the court, thus: —

May it please the court. I regret very much that it will not be in my power to alleviate the weight of the burden which it is my duty to impose on your patience.

I cannot instruct you by my learning, amuse you by my wit, make you laugh by my drollery, nor delight you with my eloquence. All I can do is to express to you in plain language the convictions perhaps of a mistaken judgment; but such as they are, I shall deliver them to you with as much brevity as possible. Before I enter into the investigation immediately before the court, I beg leave to make one or two remarks for the consideration of the gentlemen on the other side, particularly Mr. Lee and Mr. Martin. They all call aloud for an open deed of war; for the explosion of bombs, the thunder of cannon, or at least the firing of small arms. They will not be satisfied without a battle. This ground they cannot take. The constitution speaks not of *an overt act of war.* The law speaks not of *an overt act of war.* It speaks of *levying war.* Why, then, this clamor for blood and carnage, for open deeds of war? Is it possible that these enlightened counsel do not perceive the difference between *an open deed of war and an overt act of levying war?* An open deed of war is an act of hostility, the employment of actual force, a battle. An open deed of *levying war* is the assemblage of troops. If you go beyond that line, if these troops employ force, or fight a battle, it is folly to call it *an overt act of levying war; it is an open act*

of the war previously levied. Why did the constitution say *an open act of levying war*, if it meant *an open act of war?* If it had meant it, it would have said that treason shall consist in making war upon the United States; but that no person shall be convicted but by the testimony of two witnesses. If the respectable men who framed it had meant so, they would have said so in plain terms. There is a real essential difference between the two things. When the conspirators are *prepared* for *battle*, that is *the overt act of levying war;* but when a battle is fought, when the two hostile bodies meet and rush on to battle, then it is an *act of war.* Is not this distinction plain to the mind of every man of common sense? and is it not according to the obvious meaning of the constitution? Why, then, should these gentlemen, distinguished as they are for learning and talents, call so loudly and vehemently for open deeds of war, when they must have known that the overt act of treason consisted in *levying* war against the United States, and not in making it. This is an argument that ought to have great weight with them, because on the principles in which it is founded depends the preservation of this constitution to which they profess to feel such an invincible attachment.

An argument which has been presented by Mr. Botts bears so strong a resemblance, not in form but in principle, to the argument now before me, that I think proper to advert to it now. I shall not undertake directly to reply to the positions which he has advanced, but to a single remark which he made; and to which I call your attention. Not because there was anything personal in it (which I would not name to the court), but to correct a mistake. It is in relation to the trial of Fries before Judge Chase; for his conduct in which, with other causes, he was afterwards impeached. Mr. Botts says that we are now advocating opinions which on Fries's trial we condemned. It is not so. It is a mistake; for I shall not deny the sentiments which I then entertained; nor is it material to advert to the opinions of my particular friends and associates. But I beg leave to assure the gentleman that the censure which the judge drew on himself was not on account of his opinions, however in-

correct they might be, but for his arbitrary and irregular conduct at the trial; which was one of the principal causes for which he was afterwards impeached. He attempted to wrest the decision from the jury, and prejudge the case before hearing all the evidence in it; the identical thing which this court is now called on by these gentlemen themselves to do.

The first article of the impeachment will show this to be the case. It declares that his conduct on the trial of Fries was highly *arbitrary, oppressive, and unjust.* It is in these words: —

"That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them faithfully and impartially, and without respect to persons, the said Samuel Chase, on the trial of John Fries, charged with treason before the Circuit Court of the United States, held for the district of Pennsylvania, during the months of April and May, 1800, whereat the said Samuel presided, did, in his judicial capacity, conduct himself in a manner highly *arbitrary, oppressive, and unjust,* —

"1. In delivering an opinion in writing on the question of law, on the construction of which the defence of the accused materially depended, *tending to prejudice the minds of the jury against the cause of the said John Fries,* the prisoner, before counsel had been heard in his defence.

"2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States which they deemed illustrative of the positions upon which they intended to rest the defence of their client.

"3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law as well as on the fact which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give."

Well, sir, what is the thing which the gentlemen con-

cerned in this defence are calling on the court to do? The identical thing which Judge Chase did. It is the same in principle precisely, to deliver an opinion on a question of fact, and that question referred already to the jury! They call on the court to decide whether there have been an open act of war or not. All their arguments are to prove that this court has a right to decide that an act has or has not been proved. Will the court take away the power from the jury because the prisoner asks it to do so? Suppose the court was now to say that the overt act was proved, how would it operate on the accused? I ask whether this court would be willing to answer the question of fact, and submit the case to the jury with an impression that its opinion would prejudice the minds of the jury against the accused. The gentleman will excuse me for saying that he manifests some degree of inconsistency when he declares in court, and in the face of the world, that the court is first to decide on facts, and that then the same facts are to be submitted to the jury. If the court will interfere on the motion of the accused, it would do so on the application of the prosecutor, and prevent the accused from producing testimony in vindication of his innocence; which would be monstrous.

Having made these few remarks, I will proceed with as much brevity as possible to the discussion of the question before the court. I will not pretend that I perfectly understand the argument of the gentleman. The subtilty of his remarks, the rapidity with which they were delivered, and the want of a written statement of the positions which he professed to maintain, may have prevented a distinct comprehension of them on my part. But though I may have mistaken the arrangement, I believe I understand the principles, tendency, and object of his arguments; and that it will not be difficult for me to demonstrate to all, except to the gentlemen themselves, that they are unsound. The great and leading principle for which he contended was this: that Mr. Burr not being present at the time when the crime was committed, there is an end of the prosecution; that no further evidence can be heard; and that all the other testimony which we have to produce shall be cut off.

I will make this preliminary remark: that the motion is irregular and unprecedented. There cannot be found one single case in the annals of judicial proceedings in Great Britain, where a motion was made to give jurisdiction to the court over a question of fact, and to exclude evidence which is directly relevant from being submitted to the jury. We charge the accused with having levied war against the United States; with being guilty of an overt act of levying war against the United States; and the evidence which we offer, and which they oppose, will go directly to prove the truth of the allegations in the indictment. Improper evidence may be objected to as inadmissible; but a motion to exclude *all evidence*, on the ground that a fact cannot be proved, is unprecedented. The court has no authority to grant such a motion. Such power has never been exercised by any judge on any occasion. I speak with confidence when I say that no such motion was ever made before in that country or this. If the court choose not to rely on the extent of its own information, and such a case can be furnished, it can be brought forward by some of the numerous counsel engaged in the defence. If it be not, it will be fair to conclude that no such case can be produced; but I am serious in my own opinion beyond the possibility of doubt that this motion is not warranted by any case or authority whatever. If such a case exist, I call on them to produce it.

The gentlemen have manifested a disposition to introduce novelties of the most dangerous tendency. At the very commencement of this prosecution the challenges made to the grand jury evinced this disposition. It was not deemed by me, nor was it material, whether the grand jury consisted of sixteen or eighteen; or whether A, B, and C, or D, E, and F, composed a part of it. I cannot, however, but observe, that that very exception was not warranted by any English precedent. Other extraordinary steps have also been taken by the counsel of the accused in behalf of their client. But this motion is as unjust and dangerous as it is novel; because, if ever it shall be determined by this court that it has it in its power to take the decision of facts from the jury, the trial by jury, one of the great bulwarks of civil liberty,

may be struck down and destroyed. Mr. Wickham was perfectly sincere, I have no doubt, when he said that the constitution was framed for the perpetuation of the liberties of this country: that it could only be maintained by preserving it inviolate; and that to define and limit treason was one of its primitive objects; yet he would exclude from it its most valuable provision. I do not say that the success of this motion would absolutely root out and destroy, but it would as a precedent impair the trial by jury; and it is infinitely more important that the trial by jury should be preserved in all its purity than that the law of treason should be fixed within certain limits. The law of treason commonly affects a few; a few turbulent, ambitious, aspiring characters. The great body, the most valuable part of the people, will never be affected by it. Had the gentleman manifested the same zeal, and displayed the same talents and ingenuity, in support of this doctrine, which he has done in defence of what he conceives to be the correct construction of the constitution, he would have satisfied this court that the principles which he has advocated within these walls are fraught with the most terrible mischiefs that can be conceived. This subject has always been considered as most intimately connected with civil liberty, and cannot be too cautiously attended to.

I beg leave to observe, before I enter into a particular examination of the arguments of the gentleman, that his motion is founded on a supposition that we cannot prove, by the subsequent evidence, that the accused was present; and Mr. Wickham, aware of this, said that it was admitted. This is an assumption of a fact which he was not authorized to make. In saying that the evidence will not prove the actual presence of the accused, he has assumed what he has no right to assume. He will do me the justice to say that I had no objection to his proving, by any kind of evidence, the actual presence of the accused at the time and place charged in the indictment; but I expressly deny that I have admitted the fact to be so. How, then, can the gentleman object to the evidence on a supposition that it will not prove a particular fact? Did a case like this ever occur before?

Chief Justice. — The court has been considering the

subject, on a supposition (from what passed at the bar) that it was admitted that the accused was absent.

Mr. Wickham. — Mr. Hay has frequently avowed his belief that the accused was absent; but if he choose to retract this admission, as we certainly have a right to consider it, let him come forward *and prove now*, if he can, that he was present.

Mr. Burr. — Instead of objecting to it, I invite the testimony to show that I was then present on the island.

Here a desultory conversation ensued between the counsel. Mr. Hay denied that the gentlemen had a right to assume, that the evidence to be produced would not prove any particular fact, but declared that he was disposed to act with perfect candor, and that his own *belief* was, that the accused was not then present on Blannerhassett's Island; though he had not admitted it hitherto only by way of illustration or argument; that this admission, however, could not produce the result insisted on by the counsel of the accused: it did not prove that all further evidence must be rejected, and that there must be an end of the prosecution.

Mr. Hay then proceeded. The gentleman has laid down four propositions in support of his motion. He contends that no further evidence ought to be heard,—

First. Because if Burr were not present, he is merely an accessory, and not a principal; and that being an accessory to treason is not an offence punishable by our constitution and laws.

Secondly. Because, if he be a principal in the treason, he is a principal in the second degree; whose guilt being merely derivative, no parol evidence can be admitted against him until a record be produced of the conviction of the offender in the first degree.

Thirdly. Because the fact must be proved as laid; and as the indictment charges the prisoner with levying war on Blannerhassett's Island, evidence which does not prove him to have been on the spot is inapplicable to the indictment.

Fourthly. Because no parol evidence can be given to connect the prisoner with those on the island, until we show an act of treason in those others; and the assemblage there was not an act of treason.

These are the legal positions advanced in support of the main proposition for the exclusion of the evidence.

Mr. Wickham also contended for this exclusion on two other grounds: First, that the indictment charges Burr with having levied war with persons *unknown;* and the evidence shows that they are *known.* And secondly, that the indictment does not state that a *public* war was levied; that therefore it is to be presumed to be a private war; and the evidence shows, if any war, a public war. Of these two positions nothing will be said; neither of them was mentioned by Mr. Randolph; and the last seemed to be abandoned on the second day by Mr. Wickham himself, and yesterday by the accused himself.

I do not know that I shall make any remarks on the fourth proposition. That doctrine has been already discussed by my very able and eloquent coadjutor with such perspicuity, and so much learning and ability, that he seems to have left nothing for me to add. He has most clearly and satisfactorily established that point; in doing which, among other arguments, he showed the most exact coincidence of opinion between the judge who presided at the examination of the accused and the Supreme Court of the United States, both concurring in sentiment that the assemblage on the island constituted an overt act of treason in levying war.

The four reasons above stated seem to be the main pillars of the edifice constructed by Mr. Wickham for the protection of his client. I shall examine their foundation and materials. If they be bad the whole structure falls. In doing so I will endeavor to be candid; and I will be so. I shall not urge a single principle that I do not believe to be correct. I have no latitude. It is as much my duty to argue fairly, and to conduct the prosecution on behalf of the United States with candor and impartiality, as it is that of the court to decide with integrity and independence. But I cannot feel indifferent to the performance of my duty. If it were the only object in view, or could they obtain their object without mischief to the community, I should not feel much solicitude about the effect of this defence. But considering it in connection with the trial by jury and the possible influ-

ence its success may have on that best mean of maintaining the liberties of my country, I cannot but view it as a battery erected to beat down the temple of justice itself. With this impression on my mind, I cannot entirely divest myself of solicitude and alarm. Yet I will endeavor to regulate my argument by reason and justice.

Before I examine the several reasons urged in support of the leading proposition, let us attend to the result to which it brings us — the exclusion of further evidence. Instead of following Mr. Wickham through the devious, perplexing, and extraordinary course which he has thought proper to take, let us go to the spot to which he means to conduct us, through the plain, straight road of common sense, and attend to the consequences. The consequences are, that relevant evidence bearing directly on the issue is to be arrested in the midst of a criminal prosecution, because it is said that a particular fact cannot be proved. The most important evidence is to be cut off, and the prosecution without it is to fall to the ground. Admit for a moment, sir, that Mr. Burr was not present on the spot at the time; the conclusion contended for would be a prostration of the clearest and best established principles and laws; which we hope never to see violated. We say that according to the constitution and laws of the United States, the law of England, even the common law, which gentlemen take up and put down, adopt and reject according to their pleasure, the actual presence of the party is not necessary. We say that if he were leagued in the general conspiracy, and performed a part in it, however minute that part may have been, and however remote he may have then been from the scene of action, it is sufficient to make him a principal in the treason. This is the position we take, and which we are authorized to take by the decision of the Supreme Court. It places us on that high ground. The language of that court is so clear and explicit, that the proposition is laid down in the very terms which I have just used: "All those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." If such be the law, or if we mean to contend that it is the law, ought we not to have it in our

power to submit to the jury all the evidence of his being a conspirator and having performed a part in the conspiracy? The question under consideration is, whether he be guilty of an overt act of levying war, or not; and this question is for the consideration of the jury. If he were leagued in the conspiracy and performed any part, whether he were present at the immediate commission of the offence, or at another place, is totally immaterial. The great question is compounded of law and fact, of which the jury are judges; therefore every allegation which relates to the indictment, all the evidence relating *to* or bearing *on* the issue, ought to be brought forward and heard by the jury.

This is a great principle, from which the records of judicial history give us no instance of a departure. Its preservation is essential to the security of freedom. It is one of the strongest bulwarks of civil liberty.

Before this elaborate argument commenced, taking it for granted that the great principles contended for by me were indisputable, I had no apprehension that any attempt would be made, even indirectly, to avoid their effect or render them null; for an open attack was not to be expected; and I will venture to pronounce, that you did not, and could not, anticipate the motion made by the gentleman; a motion for which the counsel of the United States neither were, nor on any principle of rational expectation could be, prepared. *We* say that he is guilty of levying war against the United States. *He* says that he is not guilty. The issue is thus formed between us. The evidence sought to be excluded bears directly on the point in issue. We will prove that he is guilty of levying war against his country, within the meaning of the constitution. The framers of the constitution never intended to take the decision of the general issue in a criminal case from the consideration of the jury and give it to the court. But the court has already explained this doctrine, in its opinion delivered on the 18th of this month; that *levying of war is a fact to be determined by a jury:* the court may instruct the jury upon the law of the case. Any points of law involved in or arising out of the cause, the court is to explain for the information of the jury; but the jury

alone are to decide the issue. But what releases the jury from all dependence on the court is, that they may give an opinion in direct opposition to that of the court, if they believe conscientiously that they ought to do it. The constitution and laws have given them a right to do so. It is their exclusive province to determine questions of fact. *Littleton*, in section 368, and *Coke on Littleton*, p. 155 (*b*), are conclusive authorities on this point: that every question of fact or no fact is to be ascertained by a jury. If the prosecution is to be carried on, the jury have a right to hear *all* the evidence belonging to the issue between the parties and bearing directly on the points in controversy. I contend that such has been the invariable practice in Great Britain; that *in all criminal prosecutions* juries *have all* the *evidence*, whatever points of law may arise in the course of a trial; and that no judge in that country has ever dared to arrest a criminal prosecution in this way. I call on gentlemen to produce their authority, to show a single instance of the exercise of the authority now so earnestly pressed upon the court.

To wrest from the jury the decision of facts in a criminal prosecution is a most dangerous proposition. It is replete with incalculable mischief. I feel infinitely more solicitude about the preservation of this principle in all its purity, than for the correct construction of the doctrine of constitutional treason as contradistinguished from constructive or oppressive treason. I consider this principle of the trial by jury, preserved in its utmost purity and independence, as connected with the best principles of the human heart. It ought to be viewed and approached with the utmost reverence and caution; and when a judge is called on to do what may lead him to encroach on this principle, he will advance with the utmost circumspection and awe. I will take the liberty to say, that it will be far more safe and correct to remain a thousand miles on this side of the line which separates the rights of the jury from those of the court, than to go a hair's breadth beyond it; and if he should approach, he ought for no human consideration to touch it. If ever he do, he undermines civil liberty. This principle has for a long time been held, not only in the highest estima-

tion, but even regarded as sacred, in England. It is to the reverence with which it has been regarded that we are to ascribe that portion of civil liberty which the people there still enjoy. It is for these reasons that no such case as this has ever happened. No such attempt has ever been made before any tribunal in that country; and certainly not in this. This is the reason why all the learning and researches of gentlemen have not enabled them to produce a case like this. Even the temerity of counsel has not brought such a case before any court. Gentlemen have not pretended that they could support the motion by direct authority, *totidem verbis*. They have not attempted to adduce such a case, nor even to say that such a case can be found. But they think they have accomplished their point by producing one or two cases which warrant an inference in favor of their motion. Let us examine those cases, and see whether they be sufficient to justify this motion, which goes to the exclusion of the evidence. They say that when a man is indicted as an accessory, "you must prove the conviction of the principal first." They object to evidence bearing directly on the points in controversy, and say, "You must produce the conviction of those who were on the island before you can rightly proceed against us." Their argument, that the accessory cannot be tried till the conviction of the principal, is not law; and if it were law, their inference which they deduce from it, that we cannot proceed against the accused till Blannerhassett or his associates on the island shall have been tried, is incorrect. They seem to have taken it for granted that their bold motion would pass unexamined and uncontradicted, and that the evidence would be excluded and the trial stopped on their application. For the case which they have supposed, and to which alone their arguments can apply, is not before the court. I wonder what put it into the head of the gentleman who first introduced it; for there is no law to warrant the position.

The real doctrine is this: that if a man be indicted as an accessory, he is at liberty to state before his trial, when the indictment is called, that he does not choose to be tried till the principal be convicted. The judge knows that his objection is valid, and he *suspends* the

prosecution till the principal be convicted ; either confining him in prison, or bailing him till the time of his trial, according to the circumstances and principles of the case. Does this prove that the production of the record of the conviction of the principal is absolutely necessary ? He may choose to be tried, and waive the right of suspending it. It never was said that it was in the power of the accessory, after he had consented to be tried, had been arraigned and pleaded not guilty to the indictment, without any objection, when he found that the testimony bore heavily upon him, then to call for the record of his principal's conviction, as a preliminary point.

In 1 *Hale*, p. 623, it is stated that " the accessory shall not be constrained to answer to his indictment till the principal be tried ; *but if he will waive that benefit and put himself upon his trial before the principal be tried, he may ; and his acquittal or conviction upon such trial is good.*" I contend, therefore, that the position which the gentleman laid down does not bear him out ; nor are his arguments founded in law.

But admit for a moment that the argument is founded in law ; that an accessory, *indicted as an accessory*, has a right to say, " Produce the record of the conviction of the principal. I require it before you proceed against me." This ingenious argument does not prove their position ; it does not apply to the case ; for the accused is not charged as an accessory, but as a principal. Gentlemen do not support their motion by any direct authority, but by inferences and deductions. Among other circumstances they infer it from this case in *Hale*. But it is not an analogous case. There they look at the indictment itself ; and as it shows the accused to be charged as an accessory, they are not obliged to do any act, as in the present case, to decide a question of fact. Admitting their argument to be correct, that inference is erroneous. In that case no act can be done till the principal be convicted ; but here the accused is indicted for doing a particular act. He is indicted for levying war on Blannerhassett's Island ; and we offer evidence in support of the indictment. If he say that he is an accessory only, and that by the laws and constitution of this country an accessory is not punishable, does it not amount to the very

question before the jury? Is it not the identical defence of *not guilty* made before the jury? It is not so in England; for such a defence could not be pretended there. It is coming to the same point by two steps instead of one. Instead of pleading at once that he is *not guilty*, he says that he is an accessory; that accessories are not answerable; and therefore he is not guilty. And this issue they call on the court to try; and what is more astonishing, the court is called on to decide this issue with one half or one fifth part of the evidence! Of all novel and extraordinary doctrines, this is perhaps the most unheard-of and preposterous. The gentlemen seem, indeed, to have emancipated their minds from the shackles of established law and usage. They may consult all their lore of learning; they may hunt up all the volumes in their libraries; they can find no express adjudication to warrant this attempt to substitute the court instead of the jury as a tribunal for the decision of facts; and their inferences are wholly drawn from a position which is not law. I hope to be excused for pressing this point any further; but I feel infinitely more interested in this than any other in the cause. If the court should undertake to decide this motion in favor of the accused, does it not undertake to decide that he is an accessory, and that being an accessory he is not guilty? Is not this the identical question before the jury? We have a right, an indisputable and solemn right, to lay before the jury all the evidence relevant to the charge. It is a universal principle, that all the evidence relevant to a charge submitted to a jury shall be laid before them; and that they are to judge of the whole case; and that the court is only to expound the law. The court has expressly recognized this doctrine in speaking on another point: "Even if the court should be of opinion that the fact proved by the witnesses did not amount to levying war, they could not arrest the evidence." [See the opinion of the court delivered on the 18th day of this month.]

That opinion of the court is directly applicable to this case. The jurisdiction over an issue of contested facts is disclaimed by that decision. If the court would not undertake to decide that point, will it undertake to decide

the whole cause: that in consequence of the absence of the accessory he is not guilty? We charge Aaron Burr with levying war; that whether he were present or absent, he did levy war; and which question compounded of law and fact must be left to the jury.

Mr. Martin referred the court the other day to 4 *State Trials*, p. 661, in support of their doctrine. That is Rockwood's case. It is easy to show, that though he introduced it as authority in his favor, it counteracts the purpose which he intended to effect. Rockwood's counsel contended that the overt act was not proved by two witnesses, and wished to obtain from the court an expression of its opinion to that effect; because they said that if there were not two witnesses, as the law required, they needed not to trouble the court with their evidence; but they made no motion to stop the inquiry, or to exclude further evidence. And Holt, chief justice, said to the jury, that whether the overt act were proved by two witnesses or not, was the question for them to determine.

The same doctrine occurs in 2 *Dallas*, 356: "It was proved by two witnesses that Mitchell, the accused, was armed at Couch's Fort, where the conspiracy for attacking General Neville's house was formed. One witness proved positively that he was at the burning of General Neville's house; and another said that it was in his head that *he* also saw him there; and he was actually passed on the march to Neville's house. On this state of the facts it was contended before the jury, that the act of treason was not proved by two witnesses; that at Couch's Fort there was only a conspiracy; and that only one witness proved him to have been at General Neville's: but no motion was made to take the cause from the jury, or to exclude further evidence. Now, sir, how came it to pass, that the counsel in neither of those cases took the course which has been taken in this case? It has been recently discovered to be proper; and these gentlemen are entitled to the merit of that discovery.

I will not make use of Mr. Wickham's observation, nor insinuate that the counsel in those cases, or in this, knew nothing of the law. I will not say that the counsel of Rockwood and Mitchell did not possess the talents and information of the gentlemen concerned for the accused;

but it may be safely said that the idea never entered into their minds that such a course ought to be pursued; that the proceedings ought to be stopped; and that the court should inquire whether the overt act had been proved or not.

A further illustration of this doctrine, of the power of the court to exclude evidence, has been derived from this *dictum* in the books: that after proving the overt act in the county where it is laid, you may then prove overt acts in other counties; and the authority of 1 *East*, 125, 126, is referred to. From this it has been inferred that the court must decide on the overt act laid before admission of collateral evidence, and reject other evidence if the overt act be not proved. I shall not speak of East as Mr. Wickham did. He appears to me to be a man of talents and learning, whose opinion is entitled to respect. I conceive that the real rule is this: that after *giving* your evidence of the act laid, you may then give evidence of overt acts in other places. The court may prescribe the rule thus stated with safety, without deciding any fact whatever; besides, till *then* the other evidence would not be relevant. But taking it as contended for by the prisoner, it involves this absurdity, that the court must decide a fact. After having *introduced* evidence with respect to the facts on Blannerhassett's Island, we are at liberty to introduce evidence of other acts done at other places. The *introduction* of this evidence of facts on the island, renders relevant the evidence of acts committed elsewhere. For they are in corroboration of the acts on the island, according to this interpretation of the rule, and which we think the only rational one. The *introduction* of any evidence of the overt act on the island authorizes us to offer evidence of acts elsewhere to confirm it. Till such evidence of acts on the island be *introduced*, the evidence of acts elsewhere is wholly inadmissible. Whereas, according to their construction of the rule, the overt act laid must be first *proved;* the court must first examine a question of fact; and having determined in its own mind that the overt act laid is in point of fact proved, then it decides the point of law consequent on that fact: that evidence of acts elsewhere may be received. So that in the whole case there is no express

independent decision by the jury. This difficulty has been produced by these intelligent authors themselves. It has arisen from a sort of affectation of avoiding the repetition of the same word. Both writers and speakers involve themselves in some little difficulty by the use of this kind of style, and sacrifice perspicuity to supposed neatness of composition. In this manner East, in his first volume on *Crown Law*, 125, has occasioned some ambiguity by introducing the word *proof* instead of the word *evidence*. The sentence as he has it is, "After *proof* of an overt act in the county in which the treason is laid, evidence may be given of any other overt acts of the same species of treason in other counties." But read *evidence* instead of proof: that *after evidence of an overt act in the county where the treason is laid, evidence may be given of other overt acts done elsewhere*, and the difficulty is removed; and there will be no question of fact to be decided by the judges; one kind of evidence will succeed another as of course before the jury. You will observe, that if East had not been under the dominion of this affectation, — and which all men will occasionally feel, — this difficulty would not have existed. But Mr. East is not liable to the charge of an unpleasant repetition, as the word proof is synonymous to the *word* evidence or testimony. But this advantage is procured at the expense of precision.

But there is another rule which will demonstrate the absurdity of the rule of East. It is this: that the court must decide that the collateral evidence is to be let in on the very ground which renders it unnecessary. Let us put a case to illustrate the subject. The prosecutors say, "We now offer collateral evidence, because we have already introduced our evidence concerning the overt act laid in the indictment." The court tells them, You cannot do it. They ask, Why? The court answers, Because you have not *proved* the overt act. The counsel for the prosecution say, We *have* proved it. The counsel for the accused deny it. And the court decides that the collateral evidence is admissible. Why? On the very ground that the overt act is already proved. If the court say it is proved, why require more evidence? What is the result? If the court determine that he shall have the privilege of

bringing forward more evidence, it is because it is not necessary. The court places its admission on a ground that renders it ridiculous and absurd. If the overt act be not proved, then all other evidence whatever is entirely inadmissible; but if it be proved, then it is sufficient without further testimony. In the trial of *Fries*, 175, the counsel for the prisoner asked the court whether the overt act must not *be proved to the satisfaction of the jury*, both as to fact and intention in the same county. To which Judge Iredell replied, that he thought Foster's opinion had settled that point; and he declared that it was an inadmissible doctrine "for the court to say whether there was a treasonable intention or act;" that "*that is for the jury to determine.*" But it never occurred to the counsel of Fries, though men of great learning and experience, that the court was to decide on the proof of the overt act. Human ingenuity cannot support the doctrine. It gives to the court a power which has never been exercised in England or this country by any court.

But a very ingenious argument was advanced by Mr. Botts, which he supported by the authority of 1 *East's Crown Law*, 96, 97 [which see quoted before]. In the latter page he concludes thus: but "when the connection between the parties is once established (of which the court must in the first instance judge previously to the admission of any consequential evidence to affect the prisoner by the act of others, to which he was not a party or privy), then whatever is done in pursuance of that conspiracy by one of the conspirators, though unknown, perhaps, to the rest at the time, is to be considered as the act of all." And Mr. Botts, from this authority, contends that the court in this case must also judge, in the first instance, whether the overt act laid in the indictment be *proved* or not, so as to render admissible collateral evidence to corroborate it. He infers, that because the court is said by East, in that case, to judge in the first instance of the connection between the parties, before the act of one of them shall be admitted in evidence against another, the court must in this case judge of the proof of the overt act before collateral evidence shall be introduced.

The general principles laid down by East in these two pages, with respect to the necessity of first proving a con-

spiracy or an agreement among several to act in concert for a particular end, and the subsequent admission of the acts of one of them in evidence against others, are unquestionably correct. If you be trying A for a particular act, you cannot bring forward the conviction or acts of B against him, for the reasons I mentioned some time ago, that such evidence is not relevant, and of course it is not just. If A be accused of a particular act, evidence affecting B would be inadmissible against him, unless a connection be proved between them. If this connection be proved, then the evidence is relevant, and the act of B is thereby the act of A. But the question is, who is to judge whether the connection between A and B be proved or not? I contend, for the reasons, and on the authorities, which I have already adduced, and which cannot be refuted, that the jury must judge. East says that the court must judge. I should be glad to know who made East a judge. In support of this part of the authority there is no reference. Admit the rest of his doctrine to be law (for he produces authority to support it), yet whence does he get that part which says that "*the court must judge*" whether the connection between the parties be proved? There is no express authority. It is only the inference of the writer, and which the ingenuity of the counsel on the other side converts into authority. It is a very serious and difficult undertaking for any individual to write a copious treatise on the science of the law to be received as authority. Few men are like Hale or Blackstone, the weight of whose characters, and the splendor and solidity of whose talents, give the sanction of authority to whatever they publish. I will admit that Mr. East is a man of respectable talents; but we shall not receive his mere *dictum* as authority when it leads directly to the prostration of first principles, especially when there are practical illustrations of the contrary doctrine. This doctrine is manifestly repugnant to common sense; and that is the rule by which every proposition should be tested. It is the *terra firma* on which every correct principle is founded. If the case just spoken of be examined by this rule, there will be no difficulty; there will be no absurdity involved. The court would state to the jury, that if they be satisfied, from the evidence, that the connection

between A and B is proved, then the evidence of the acts of B must operate against A. But if they do not think the connection between them is proved, then they must disregard the evidence relative to the conduct of B. The gentlemen have no legal principles in support of this monstrous proposition; nor have they any authorities. The cases on which they rely do not maintain their doctrine. I hope that I have satisfied the court that the gentlemen have shown neither principle nor authority to justify the assumption by the court of the power to exclude further testimony.

The usual hour of adjournment being now past, Mr. Hay expressed his desire to postpone the delivery of the rest of his argument till to-morrow.

THURSDAY, AUGUST 27, 1807.

Mr. Hay resumed his argument. After briefly recapitulating the substance of what he had said last evening, he proceeded thus: —

The gentleman who preceded me, in order to show that the court might undertake the decision of a question of fact, quoted as authority 2 *Mac Nally*, 547. The authority does not apply. What bearing has it on the case before the court? because it is advanced on the principle that the facts are stated in a special verdict by the jury? It was in the case of The King *v.* Major John Oneley, indicted for the murder of William Gower.

"Raymond, J., after argument on a *special verdict*, laid down this proposition, to which all the judges agreed: that the court are judges of the malice, and not the jury; and that the court are also judges of the fact found by the jury, whether, if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not."

There is nothing in this authority which justifies the inference of the court as to facts. The jury find the facts; and the judgment of the court is still dependent on their finding. The court, on their special finding, decided that *Oneley* had sufficient time for his passion to cool between the time of the words spoken and of their fighting; and, from all the circumstances, that he did the fact deliberately, and with malice prepense. But the same

authority states that the jury may always find a *general verdict;* that they may not only decide on the question of fact, but on the question of law connected with it also. In the very next paragraph, it is said that the jury, who are before stated not to be judges of malice, may take upon themselves the decision of the questions both of law and fact. He states the opinion of Foster, "that in cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict; but where the law is clear, the jury, under the direction of the court in *point of law*, matters of fact being still left to their determination, *may*, and, *if they are well advised, will always, find a general verdict* conformably to such direction." The first paragraph, as understood and argued by the counsel on the other side, is inconsistent with the last. In what embarrassment, contradiction, and difficulty are counsel sometimes involved by reference to authorities which do not support them in attempting to maintain untenable positions!

I stated yesterday, in answer to Mr. Botts, that it appeared to me to be repugnant to common sense (which, in some cases, is better than all the learning in the world) for a court to determine the relevancy of any testimony on a principle that rendered it unnecessary. While it might be useful, it is irrelevant; but the moment it becomes relevant, it becomes unnecessary by the very principle which constitutes its relevancy—the previous proof of an overt act. I stated that such a rule could never be correct; and that this reason and the substitution of the court instead of the jury for the decision of mere facts were insuperable objections to the rule as expounded by the prisoner's counsel. Is it necessary to press this point? Is it necessary to prove to this court that the power, which the counsel of the prisoner so earnestly press the court to execute, has never been exercised by any court? to tell this court that it would be an encroachment on the legitimate authority of another tribunal? that the principle is mischievous and unsupported by authority? But if there were forty thousand authorities introduced in support of it, they ought not to be regarded; because they must lead to consequences fatal to the happiness and liberty of the people of this country.

I have said that the pillars of this great edifice erected by Mr. Wickham had no foundation. I will examine the materials of which they are made; and I believe it will be found that they are defective. They cannot, in my estimation, resist the slightest pressure. Testing the proposition by its illegal conclusion, it must fail. To test the purity of a principle is to look at its result; to what its practical operation is. If it lead to a consequence absurd in itself or pernicious in its tendency, — that is, if the consequence be regularly deduced from this origin, and found to be destructive, — the proposition itself must be rejected.

Mr. Wickham says that his proposition, that Burr is an accessory, and not a principal, is deduced from the constitution of the United States, their laws, and the laws of England. His first position was, that there is no treason in the United States but that which is defined by the constitution. Agreed. This is sound doctrine.

His next position was, that no man can be punished but he who does the act thus defined. This is conceded also. But when he says that this act of levying war against the United States cannot be performed but by a person present on the spot where the offence is alleged to be committed, I deny the correctness of the position, and aver that it is not founded in sound sense, or in the law of this country or of Great Britain. A man may levy war without being present with the troops where the offence is alleged to be committed, or even without making actual war at all. It is unnecessary to press the distinction between levying war and war itself. The common sense of mankind has decided this question. The man who levies war is he who projects the plan, provides the means, causes soldiers to be enlisted, and arms and other necessaries to be prepared, and directs and superintends the whole operation. He may sometimes be also master of means sufficient for the subversion of the liberty and happiness of a whole people. What would be the course of conduct which a man at the head of a conspiracy to subvert the government of his country, and to raise himself on its ruins, would pursue, you may easily judge. Supposing him to be a man whose understanding was equal to his ambition, he would proportion the means to the end. He

would use activity and enterprise. He would be confined to no particular scene of operations. He would be here and there, and at every place, where and when it would be necessary to prepare for the accomplishment of his great object. He might give directions to different bodies of troops to meet him at given times and places; while, in the intermediate time, he might make arrangements at different places to prevent disappointment, and to secure final and ample success. Is it necessary, according to common sense, that a leader should be present at the very moment when an assemblage of part of his soldiers is to meet at a particular place in consequence of his previous orders? There may be twenty different assemblages. If he be a man of talents, intelligence, and activity, he may have formed his designs so wisely, and concerted his measures so skilfully, as to have fifty, or five hundred, or even a thousand different assemblages and subordinate plans conducing to one common end, all going on at the same time without his actual presence. He is not present at any one place; but he directs and commands everywhere, and vigilantly waits for a favorable moment till he can strike a *final* and *decisive* blow. On principles of common sense, it is not essential, therefore, that the commander should be present at any preconcerted assemblage of his troops. I repeat that the common understanding of mankind has decided this question. We find (and every expression used here may be soon verified) that George III. levies war against the United States three thousand miles from us. It is he who declares the war, by whose directions the troops are raised and employed. It is he who *levies* the war, and not his subjects who fight his battles, his generals and soldiers who come hither for slaughter and murder, They *make* the war upon us; but they do not *levy* it. If the subjects of the King of Great Britain were to *levy* war upon this country, they would not be entitled to be considered as public enemies, but robbers, pirates, and murderers, according to the acts which they would commit; and therefore, instead of being treated as public enemies, they would be regarded as individual offenders who had perpetrated those crimes, and proceeded against as such. But as *he* levies the war, they become public enemies in

consequence thereof. A man may, on principles of common sense, not only *levy* war, but *make* war, without being present at the place where a battle is fought. Bonaparte was not actually on the field at the battle of Austerlitz. I do not know that he was in view of the line of battle. He was in the rear with the body of reserve. Yet the victory gained on that memorable day was gained by him, because he stationed the troops, directed their movements, and stood ready to give assistance; and the glory of that victory, so decisive of the destiny of Europe, was his. He not only levied, but made war, without being personally present.

Such is the case here. Admit it to be true that Burr was not on the island, yet the men who went met there by his procurement and direction; they leave it by his direction; and he afterwards joins them, and takes the command. So that in coming to, remaining on, and quitting the island, they act in exact obedience to his command. If the assemblage on Blannerhassett's Island were an overt act of levying war, the person who procured that assemblage, by whom its movements to and from the island were directed, is emphatically guilty of levying war against the United States. Let us pursue this argument a little farther. Suppose that Burr had never been at the spot at all; but he knows that his troops are there. He apprehends that an attack is to be made on them; and to repel it, he despatches more men, arms, ammunition, provisions, and everything necessary for their defence, with orders to resist, and instructions how to conduct the battle, which is actually fought. The attack is made, and repelled. Thousands fall in the battle. Would he not then levy war? Would it be contended by gentlemen, that by the constitution of the United States, Aaron Burr, not having been personally present when this overt act of his procurement was committed, was not a principal, but an accessory? that his soldiers are principals in the treason, but that he is not guilty? that the constitution requires the actual presence of the commander-in-chief whenever a battle is fought by any part of his army, or wherever an attack is made or repelled? If he would be guilty of levying war, what becomes of the doctrine which requires his presence? The constitution requires his presence nowhere.

To prove, however, the fallacy of this doctrine, let us examine the result. He is innocent and safe. They are guilty and punished. Is it possible that the human mind can be so perplexed by learning, and so misled by ingenuity, so totally bereaved of all its powers, as to adopt a conclusion like this? to pronounce that the great projector, the prime mover of the whole conspiracy and plot, is constitutionally safe, while his deluded followers are to be hanged? Yet this is the language, and this the doctrine, of Mr. Wickham. He would make as little ceremony with Blannerhassett as Burr said he would use to *Miranda*. As to Miranda, said he, "*We will hang Miranda.*" It appears to me, sir, that that construction of the constitution which leads to such a conclusion, which shall exculpate Burr, and hang Blannerhassett, which leaves the principal to destroy the agent, is not only repugnant to common sense, but to every dictate of feeling and humanity. There is sufficient reason to deplore the misconduct and crime of Blannerhassett. He has certainly done wrong, and offended against the laws of his country grievously; but I hope to be excused for declaring that there is no more comparison between Blannerhassett and Burr, as to criminality, than there is between the breeze which gently shakes the leaves, and the storm which desolates the earth.

If this construction be not founded in reason, let us call for the law which sanctions the doctrine for which he contends. If we look at home, we shall find that this question has been decided already by our own judges. The Supreme Court of the United States has solemnly decided it in direct opposition to what gentlemen have insisted to be the law. But they say that it ought not to be regarded, because it was an extrajudicial decision.

Mr. Wickham, finding it inconvenient to prove it, pretends to anticipate our admission of it, and, with his usual dexterity, takes it for granted that he has nothing to do but to follow up that supposed concession. Let us examine the subject, and see whether it be extrajudicial or not. Bollman and Swartwout, who were never at Blannerhassett's Island, or with the troops, were before the court on suspicion of high treason. A motion was made to commit them on this charge. Having been brought

before the court on a writ of *habeas corpus*, a motion was made by their counsel to discharge them. Those cases came first before the Circuit Court for the County of Washington; and the records of that court, containing the orders by which they were committed on the charge of treason in levying war against the United States, and the testimony on which the commitment was made, were brought before the Supreme Court. I do not know by whom they were defended in that court or the Circuit Court. But I take it for granted, when I turn my eyes to that part of the world, that they were defended with ability and zeal. They were not present on Blannerhassett's Island, nor with any part of the forces of Colonel Burr; and though not present, they were charged with treason. I certainly am at liberty to suppose, whoever may have been their counsel, that they were defended with great zeal and ability; and that they were defended on this ground. From the extreme zeal displayed in the course of this defence, we may infer what defence was made for those persons; and, if so, the decision of the Supreme Court was on the very point, and must be conclusive authority in this case.

But let us suppose that this was not the point immediately in discussion, nor before the court; and that consequently the decision may, strictly speaking, be considered as extrajudicial. Still I am at liberty to say that this opinion of the Supreme Court is entitled to the highest degree of consideration and respect, and ought not to be departed from but for reasons very different in principle and effect from those used on the part of the counsel for the prisoner.

The law, as expounded by the judges of this country, not suiting Mr. Wickham, he goes to Great Britain for his law, and brings with him the common law of that country to show that the accused is only an accessory, and therefore not guilty. Let us see what benefit he derives from this voyage and importation of the common law. The very instant he opens the law-book, he finds that the common law declares, "*In treason, all are principals.*" The very system to which he resorts presents this doctrine at once to him: that in treason all persons in any manner concerned, whether present or absent, are

principals. How is this dilemma removed? The gentleman will not rely on this doctrine; and he turns to us with an exulting countenance, and exclaims, "The common law is not in force in this country under the government of the United States; you must be governed by the constitution only. The gentleman will not contradict me." He well knew that I would not controvert the position as to the non-existence of the common law. He knew that this was a point agreed. The common law is not in force in the United States. There is no treason in the United States but that defined by the constitution; and he who was not leagued in the conspiracy, and performed a part in it, whatever else he may have done, cannot be punished. In what manner does he avail himself of this concession? — that we do not claim the aid of the common law. That very instant he takes it up for his own use. Because we have disclaimed, and thrown it by, he takes it up for his own exclusive benefit: "After what you have said, *you* cannot resort to the common law, which says that all are principals; but *I* will resort to some other parts of the common law, and avail myself of them." How does he avail himself of them? After having stated that it was not in force, he resorts to it, and relies on the common law distinction of principals and accessories — a principal being the actor or person present aiding and abetting the offence; an accessory, an absent person who procures and counsels or receives and comforts an offender. Is there not in this reasoning, which disclaims and uses the same authority at once, a temerity which defies reflection, and amounts to desperation? Is it not a desperate construction of the case? Would a man of Mr. Wickham's talents contend in one breath that the common law is not in force in this country, and yet in the next make it the principal basis of his argument, unless it were a desperate case? Desperate cases require desperate efforts. He avails himself of the common law to borrow from it distinctions which he endeavors to fix, without reason or propriety, on the constitution, which he says we wish to render merely a dead letter. It is a distinction borrowed from the common law, which says that a principal is he who is the actor, or is present at the perpetration of the act, aiding and abetting; and declares an accessory to be

a person who is absent, but procures or commands or counsels the act to be done. This is the distinction in Great Britain between principals and accessories, founded on the common law. He insists that the prisoner, not having been present at the commission of the act, is merely an accessory; that an accessory is not punishable under the constitution of the United States; and that therefore the prisoner is not punishable at all.

If the common law be not in force, the gentleman has no more right to resort to it, or borrow any distinctions from it, than he has to borrow a distinction from the civil law, the *Gentoo* law, the *Chinese* law, or any other law in the world. I conceive that Mr. Wickham has himself furnished us with a conclusive reason why we should not resort to the common law for these definitions. Before I mention that reason, permit me to remark that there is something extraordinary and humiliating in this argument respecting the correct construction of the constitution. Those who framed it have used plain words, such as a man of the most ordinary capacity, as well as a man of the most enlightened mind, can understand; and yet we are not to depend on plain construction, such as is obvious to every man of common understanding, but to go to England, to resort to a system declared not to be in force, to find oút the true meaning! It appears to me, sir, to be as degrading as it is absurd, to resort to a foreign system not in force in order to introduce a distinction which does not belong to it.

I have said that Mr. Wickham had himself furnished the reason why we should not resort to the common law. The constitution, he says, must be our guide; and its construction must be governed by rules of moral right, and not by artificial rules. The only reason he gives for this is, that the constitution is a compact, and not a law. It does not fully justify his inference. It is both a compact and a law. It may be considered as a rule prescribed by a superior, or as founded in compact between parties. The fair construction is, that so far as it operates on states, it is a compact between those states, equally obligatory on them all; but as far as it applies to individuals, it is a law prescribed by the supreme power in the state (the people in convention), which every citizen is bound to

obey; and it is declared by the instrument itself to be the supreme law of the land. It is not very material in what light it is to be considered: whether as a compact, or law, or both; but this shows the construction most consonant to common sense; and that when the question is put in that way there is no difficulty.

But let us avail ourselves of Mr. Wickham's golden key for unlocking the door of the constitution. By rules of moral right, I suppose he means that exposition which will give us the intention, if the words used by its framers will bear it. Knowing the character, mental acuteness, talents, and intellectual powers of those who framed that constitution, it must be presumed not only that they intended to suppress the mischief, and advance the remedy in every instance, but that they expressed their meaning in such a manner, that if the constitution be fairly expounded, *that* object will certainly be attained. I will ask, whether it is to be supposed that their intention was that a traitor must be on the spot while his troops slaughtered their fellow-citizens, or else that he could not be punished; that the accessory should pass with impunity, while the humble instruments of his ambition should be punished.

Suppose the question put to the enlightened men who framed that constitution. Suppose they were asked at *that* time, "whether it be your intention to exclude from punishment the prime mover and projector of a treasonable plot, who shall by himself or his agents, enlist and assemble troops, and procure everything conducive to the overt act, if he be not present when the overt act is performed. Do you intend that such a contriver and leader shall not be a principal traitor, or punished at all, but that the humble and deluded instruments of his ambition shall be punished." They would all have unanimously answered, "This construction never will be adopted by any intelligent court. It will be the duty of the court to adopt the principle which will prevent the mischief; and if it be urged, that such a projector and leader being absent does not levy war, is only an accessory, and not being expressly mentioned, as such is not punishable, the court will not be at all embarrassed by such an argument, only calculated to mislead." They

could not have answered otherwise. Whence could they derive a contrary idea? as they must have intended the suppression of the mischief.

I very cordially agree with Mr. Wickham, that in the exposition of the constitution, artificial rules ought not to be admitted. If we are to be governed by the rules of moral right, and to exclude artificial rules, then we must be governed by the general principles of reason and justice, and not by rules borrowed from the most complicated of all artificial systems on the face of the earth—the common law, where the parts are artfully constructed to suit each other, and which have no sort of reference to this country. The force of this remark is illustrated very completely in this very case. In Great Britain the principal is the perpetrator, or aider who is present. The accessory is he who, not being present, procures counsels, &c. It is manifest that in Great Britain it is immaterial where you draw the line between principal and accessory before the fact, because no mischief can ensue; for all the ground not covered by the principal is occupied by the accessory; and what is not covered by the accessory is occupied by the principal. All persons concerned in the perpetration of the offence, and in the acts which led to that perpetration, are amenable to the laws and justice of their country. The definition therefore of a principal is manifestly connected with that of an accessory; both together taking in the guilt of the transaction, and the guilt that led to it.

But how does the introduction of the distinction operate in this country? The gentleman tells us, that those only are principals who are present at the perpetration of an offence; that all others concerned are accessories; and that accessories are not punishable by the constitution; so that he circumscribes the guilt of a principal, and which only is punishable, within very narrow limits. The result of his exposition is, that the constitution does not operate on the very persons whom it was intended to affect; and the most atrocious and dangerous offenders escape unpunished. Can this be correct? In England the definition of principal depends on that of accessory, and that of an accessory on that of a principal. But Mr. Wickham wishes us to borrow the definition from Great

Britain, in order to cut off one half of the offenders. He who counsels, commands, or procures treason to be committed, is to escape with impunity. It is very clear, that if Mr. Wickham's doctrine be adopted here, to have its full operation, no man can be indicted as an accessory in this country. He cannot be charged as an accessory to levying war. He *must levy it.* If you take every person who is an accessory, that is, who is *guilty* of what is termed an accessorial treason, in Great Britain, to be an accessory here, you trample on the constitution, and exempt from punishment all except those who are present at the scene of action. These, though infinitely less guilty, the humble and deluded followers, are to be punished, while their absent leaders escape; and the gentleman is the very man by whose doctrines it is to be prostrated to the earth.

The doctrine for which I contend appears to me to be infinitely more reasonable. It will not produce the punishment of all who are guilty either as principals or accessories, using those words in the English acceptation. It will extend to those only who are leagued in the general conspiracy, and take a part in it. It does not extend to him who only conspires, but takes no part; who avails himself of the *locus pœnitentiæ,* and turns from the iniquity of those men with whom he was leagued, and is a mere traitor in design, because he has performed no act. Nor will it extend to him who does what is termed in Great Britain an accessorial act after the fact. So that doing an act only, without being leagued in, or a party to the design, or designing without an act, or giving food or lodgings to the conspirators, knowing their design, but being no party to it, would not be embraced by it. He who, seeing this party going down to New Orleans, but had known nothing of them before, gave them half a dozen barrels of whiskey, would not be a traitor; because, though he did perform a minute act, he was not leagued in the general conspiracy; nor was the act done with a traitorous design. I place it precisely on the ground taken by the Supreme Court. Is not this reasonable? Is there any distinction between the guilt of the persons embraced by the construction of the constitution? Was not Aaron Burr as guilty as his

associates on the island assembled by his direction? Is there any difference in England between the guilt of the principal and the accessory before the fact? They are equally punishable with death. The accessory in Great Britain is regarded as equally guilty with the principal. I will refer to the particular authorities on which I rely in support of the position, that according to the law of England, there is no difference in guilt between the principal and accessory before the fact. 4 *Blackstone's Commentaries*, p. 39: "The general rule of the ancient law is this: 'Accessories shall suffer the same punishment as their principals.' If one be liable to death, the other is also liable." "But by the statutes relating to the benefit of clergy, a distinction is made between them; accessories *after* the fact being allowed the benefit of clergy in almost all cases; which is denied to the principals and accessories *before* the fact in many cases." 1 *Hale*, p. 626: "If A be indicted as principal and acquitted, he shall not be indicted as accessory before; and if he be, he may plead his former acquittal in bar; *for it is in substance the same offence.* But if he be indicted as principal and acquitted, he may yet be indicted as accessory *after;* for they are offences of several natures." See also p. 435. Also p. 238 (quoted before). 2 *Hawkins's Ch.* 29, section 73.

I beg leave to call the particular attention of the court to what *Foster* says in pages 361, 362. He states that there is some technical distinction between them; but he complains of some of the common law distinctions. After having stated that the point in the case reported by Kelyng (which was of an accessory after the fact) was *at length* settled upon sound principles of law and reason; but that the reasoning in that case, founded on a distinction between what was precedent and subsequent to the fact, was too refined for his comprehension; and probably would continue so till he could remove ancient landmarks, and forget the legal distinction between them, and every principle of law founded on it. And having expressed his doubt, that as a person indicted as a principal could not be convicted upon evidence tending *barely* to prove him to have been an accessory before the fact; that an acquittal upon one indictment could not be a bar to a

second, for an offence specifically different from it; he proceeds thus: —

"There were at common law some other rules, touching the connection between principals and accessories, *not*, I *doubt*, perfectly well founded; for if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial, because, say the books, *the principal was not attainted. These rules seem not to have been founded on the same natural justice, or sound policy, as those I first mentioned.* It would, I think, have been extremely difficult for a common understanding, *unpractised in artificial reasoning*, to have discovered that the mere obstinacy of one incorrigible offender should, by appointments of the same law, stop the course of justice against another; *that the accessory, who frequently is the leader, contriver, and principal in the villany*, should be permitted to bid defiance to the justice of the kingdom, merely because the instrument employed by him cannot be prevailed upon to deny the charge, and put himself upon a legal trial; and yet this was the case with regard to felony, till the statute of the 1st of Queen Anne interposed and provided a remedy."

I ask whether this court will make a distinction merely because it is made in the common law of Great Britain, in direct defiance of that which is believed to be the sound and real principle of justice, even by those who make the distinction. Shall we resort to the common law of England, which is admitted even by their ablest judges to be unjust and unreasonable in many parts, to justify a departure from common sense? Will the court do this, when the gentleman does not contend for it, because it is just and right, but because he would not remove what Foster terms the *landmarks* of the law?

But even allowing the defendant the common law, presence is not always necessary to make a man a perpetrator of the deed. It was said yesterday that actual presence at the overt act was required in every species of treason, except that of compassing the king's death. The constitution does not mention presence; therefore it is not necessary to constitute the crime of treason.

Why is an overt act necessary? Is it not because, the intention of the heart being hidden, the law requires some external act to manifest that intention to the human senses? In compassing the king's death, an overt act is certainly required to show the intention. It is a general rule, and must prevail in that case as well as in every other. It may, indeed, be more essential in *that* than in any other case to prove some act against the party accused; but I can see no ground of discrimination between it and other cases, as to the necessity of actual presence at the scene of action. Mr. Martin, who is to conclude this motion, may have ingenuity enough to point out some reason; but at present I can see no difference nor any difficulty on that point. The proof of an overt act is more essential in this than in other cases, because, as the indictment is founded on the intention, it cannot be maintained without such proof for two reasons. First, because no evidence by parol or word of mouth would be sufficient: some deed is necessary to evince the designs of the mind. Secondly, because it is in this treason alone that the intention is punishable; and therefore it is more proper that it should be proved by an open act. In the treason of levying war, it is not the intention which makes the guilt: there must be an *enlistment* and marching of soldiers, to complete the guilty intention with which they are enlisted and marched. The assemblage on Blannerhassett's Island, if completely armed, would, in Great Britain, have amounted to treason; and if treason there, will not the same acts be treason here? The mode of treason in compassing the king's death, consisting in the intention, requires, indispensably, proof of an overt act. But there is no greater necessity of *presence* in one kind of treason than in the other. I do not know that these observations are material; but they are made in anticipation of the remarks of Mr. Martin, to show that there is no such distinction as they allege; and that actual presence is not necessary. And perhaps on further reflection he will not insist on the distinction. I contend, therefore, that though Aaron Burr might not be actually present, he might commit the act charged in the indictment. He might levy war; and whether he did or not is a question of law and fact which must be left to

the jury to decide. To my limited understanding, so many motions addressed to the court, the consumption of its time, and the intrusion on its patience, in a discussion relating to contested facts, and especially this singular motion to arrest evidence relevant to the point in issue, are as improper, irregular, and unjust, as they are unusual and extraordinary.

I say that the question, whether a man be a principal or not, is in this case emphatically a question of fact as well as law. We charge the prisoner with levying war. He says that he is not guilty. We say that the facts are proved by the evidence. He says that he is an accessory, and not a principal, and therefore not guilty. His counsel call on the court to decide the very question which the jury are called on to decide, by the issue on their plea of *not guilty*. If the court arrest the prosecution on the ground that the facts proved do not make him guilty of levying war in the sense of the constitution, it decides on the plea, and decides the fact without hearing the evidence. It, in fact, decides the whole cause.

By making the question presented by the constitution and the act of Congress the only question to be submitted to the jury (that is, did the accused levy war?), we get clear of all the subtilties and refinements of the common law, which require an understanding infinitely more acute than mine to state, or even to comprehend them. I do not wish to be bewildered in this labyrinth of law. I have seen gentlemen, in merely attempting to argue, perfectly bewildered in a chaos which they themselves had created. I think it will be fortunate for this country if we expound the constitution by the rules of common sense, without the distinctions of the common law. There is too much subtilty, too much refinement, too much complexity in it for a practical system. A man may devote twenty or thirty years to its study, and not be able to comprehend it completely. I will venture to say that he will misinterpret some parts of it, however learned he may be. Even the gentleman's argument was so abstruse from the subtilties and niceties derived from that system, that not more than half a dozen among us were able to understand the direct scope of it. Let us, then, have a system of our own adapted to the situation,

habits, and feelings of the country, without the absurdities, the trash and rubbish, of the common law.

I said that the common law was not in force. This may require some explanation. I should not deem it necessary to make it, if the gentlemen on the other side had rightly understood the extent of my admission on the subject. But I think it necessary to remove any doubts, and prevent misconceptions. The court will observe that, in civil cases, Congress have made a provision for this defect by the act of 1789. But this does not extend to criminal cases by its very terms. How far certain parts may have been adopted, by the use of certain technical expressions, is an important question requiring no decision now. Certain parts of it have been taken into use, by the use of certain technical phrases in the constitution and some acts of Congress. It is the opinion of some very able men, who have combated the doctrine that the common law is in force, that some particular parts of it have a sanction from the constitution as far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government, and that certain other parts thereof are and may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated.

This idea is founded on the report of the committee of the Virginia Assembly in the session of 1799–1800, written by Mr. Madison, aided by some other able men. Beyond this limitation the common law has not been adopted under the government of the United States.

I have said that certain parts of it have been adopted by the use of certain technical phrases in the constitution. For instance, it provides "that the trial of all crimes (except in cases of impeachment) shall be by jury." Every person indicted must be tried by a jury. *The trial by jury* is a technical phrase of the common law. By its insertion in the constitution, that part of the common law which prescribes the number, the unanimity of the jury, and the right of challenge is adopted. The constitution does not say of what number a jury shall consist: whether of twelve, thirteen, or twenty-three, or any other number. But according to the practical construction of the constitution, we take it to mean twelve

men ; and that the jury must be unanimous in the opinion which they pronounce. And whence do we get this order but from the word *trial?* Whence does the accused get the right to a peremptory challenge, or a challenge for cause ? They spring from the word *jury* in the constitution. The act of Congress does not give him the right of peremptorily challenging thirty-five. It says, that if any person indicted of treason shall challenge peremptorily above the number of thirty-five of the jury, the court shall proceed to the trial of the person so challenging as if he had pleaded not guilty, and render judgment accordingly, from which the right of challenging thirty-five or a certain number is implied ; and this act is itself founded on the words of the constitution, *trial by jury.* There is in that law not one word on the subject of a challenge for cause ; and yet it is deduced from the practical construction of the common law, that he has a right to challenge for cause. The whole of this doctrine and all these rights are deduced from those words in the constitution.

I said that the question, whether a man were principal or not, was a question of law and fact which the jury must decide ; and the question, whether the accused be guilty in the first or second degree, is a question of law and fact which the jury must also decide. The question, " Who is a principal in the second degree ? " is a question of law on which the court may instruct the jury. The court may decide that question with reference to any particular case coming before it ; but the question, whether the person charged as a principal be so, is a question compounded of law and fact. The question here is not who is a principal, but whether the accused, who stands charged as such, be so in his conduct. It is compounded of fact and law, and to be decided by the jury subject to be informed by the court as to the law.

In the illustration of this doctrine the court may say that he is a principal in the first degree, or actor or principal in the second degree, present, aiding, and abetting ; but this presence need not be within sight or hearing ; for if a party be engaged in the same enterprise with the actors, and stationed where he can give them aid or protection, he is a principal. Of all these circumstances the

jury must judge according to the evidence, and apply the law as they find the facts proved. The whole evidence must therefore go before them; and they may decide on the law as well as the fact.

Therefore, whether he contend that he is merely an accessory, and not punishable, or only a principal in the second degree, and therefore not punishable until after the conviction of the principal in the first degree, yet as we charge him with levying war, we have a right to introduce all our evidence, and to call on the jury to decide all the questions resulting from that evidence.

The second reason alleged by Mr. Wickham in support of his motion, as I understand his arrangement, is, "that if the accused be a principal in the treason, he is a principal only in the second degree; and his guilt being merely derivative, no parol evidence can be admitted against him until a record be produced of the conviction of the offenders in the first degree." It does not go to show (for it is not true) that this is the doctrine in Great Britain with respect to principals in the first and second degree.

The argument, that he whose guilt is derivative should not be tried before the conviction of him from whom the guilt is derived, is already answered by showing that the question, whether the accused be a principal in the second degree or not, is a question of fact as well as of law, and belongs to the jury to decide. Whence is this idea taken, that the guilt of the accused in consequence of his absence from the spot is merely derivative? Gentlemen say, from the common law, a system which they acknowledge themselves is not in force. It is derived not only from the common law, which is not in force, but from a technical or artificial rule not founded in justice or right, that the guilt of the absentee is only derivative. This is an observation which it is not necessary for me to illustrate. I have already stated it candidly; and I hope I have proved its injustice and absurdity from its result. The prisoner who projected the plot, the prime mover of the expedition, stands under this rule in a secondary point of view; and his guilt cannot be ascertained till Blannerhassett be tried. The doctrine of the gentleman would unquestionably terminate in this result, — which is

repugnant to every principle of common sense, — that the guilt of the leader cannot be inquired into till the guilt of his followers be proved!

It is derived not only from the common law, but from a system which does not embrace that rule in relation to principals in the second degree where the guilt is obviously derivative. They say that Burr's guilt is derivative; and therefore he cannot be tried till the party from whom he derives his guilt be convicted. Now, suppose A indicted for aiding B to murder C; A's guilt is derivative; he could not aid B to murder C unless B did actually murder C. According to their doctrine, A could not be tried till B was convicted, and a record of his conviction produced. Yet by the common law, A can be indicted and found guilty before B. How inconsistent is this artificial, complicated system with itself! Derivative guilt cannot be tried till the principal guilt be first proved; yet this very same system, in its technical discrimination, permits a principal in the second degree, whose guilt on a parity of principle is derivative, to be tried and convicted before the principal in the first degree. A is charged with the fact, convicted and hung, before B is tried or even prosecuted. This is proved by 1 *Hale*, 437: "If there be an indictment of murder or manslaughter against A, that he *felonicè*, &c., *percussit* B, whereof he died, and that C and D were present, abetting, aiding, and assisting to A *ad feloniam et murdrum*, &c., *modo et forma prædicta faciend*, and A appears not, but C and D appear, they shall be arraigned and receive their judgment if convicted, though A neither appear nor be outlawed." Shall we sanction a doctrine which is inconsistent with itself? Shall we adopt an unjust rule from a system which cannot be reconciled to itself? For this case is an express and pointed authority to prove that a man whose guilt is derivative, who is not the perpetrator of the offence, but a mere aider or abettor in doing it, may be tried and convicted before the principal in the first degree is tried, or even appears.

Chief Justice. — That is the case of being present *at the fact* where the party is considered as an *actor*.

Mr. Hay. — He is not the perpetrator or actor. He merely aids and abets; for A, who appears not, is repre-

sented to be the actor. You will observe, sir, that in felony a distinction is made between principals in the first and second degree. Those who are not actors, though they may be present, are in the second degree; but all who are implicated in treason are principals without any such distinction. It is superseded by the humanity as well as ingenuity of modern justice; but according to the old common law of England, the principal in the second degree could not be tried without the conviction of the actual perpetrator of the offence, as the preceding section in Hale states: "Anciently, he that struck the stroke whereof the party died, was only the principal; and those that were present aiding and assisting were but in the nature of accessories, and should not be put upon their trial till he that gave the stroke were attaint by outlawry or judgment. But at this time, and long since, the law hath been taken otherwise," &c.

The argument amounts to a surrender of the question or point in issue. He is indicted for levying war. The argument supposes that he did levy war. He says that he is a principal in the second degree whose guilt is derivative. It is in substance a surrender of the controversy; for the argument is predicated on a supposition that he did the act wherewith he is charged. Whether he levied war or not is a question of fact which he has given up by saying that he levied it in the second degree. This concession puts an end to the argument. The constitution knows no such distinction as principals in the first and second degree.

We admit that there are no accessories in treason. Why? They say because the constitution says nothing about them. May I not, then, say, for the same reason, that the accused did not levy war. It is totally immaterial whether he did levy war in one character or another.

Chief Justice. — I did not understand Mr. Wickham as saying that the accused did levy war. He denied it. He does not say that he levied war at all; but that at common law he who counsels or procures a war to be levied by another is in the nature of an accessory; that the whole doctrine of accessories is a creature of the common law, which is not in force; and that it is impossible that the creature can exist without the creator; but

if the common law were in force with the doctrine of accessories, then he must be proceeded against as guilty of accessorial treason.

Mr. Hay. — Being indisposed, I did not sufficiently attend to be able to understand the whole of Mr. Wickham's argument. I judge the part which I did not understand by that which I did. But as he said that if the accused were guilty as a principal in the treason, he was so in the second degree, I had a right to consider it as an explicit admission that he did levy war, not in the first, but second degree.

Chief Justice. — He says that if he be a principal at all he is a principal in the second degree; not by the principles of the constitution, but by the common law; that it is an accessorial offence. This is the idea which I have of his argument, and wish to present to you.

Mr. Hay. — It occurred to my mind at the time that the argument used by Mr. Wickham amounted to a surrender of the question; and I am still disposed to believe, though I am not sure, that my commentary on his argument was correct. They themselves have placed it on accessorial ground, though there are no accessories in treason. As they admit that there is no common law to which accessories are incidental, it was but a fair inference from the gentleman's position, that he levied war in the second degree; and if he levied it in any character, he was guilty under the constitution, which recognizes no distinction. But they used this objection to enable them to stand, as the gentleman told us, on sure ground. Let us examine it further.

It comes too late, even if it were good in law, being waived by the submission of the accused to go to trial. 1 *East*, 101. The very book referred to by the gentleman proves this point. Treating of treasons of an accessorial nature, he says that "in these cases, therefore, the treason is of a derivative nature, and depends entirely upon the question, whether the agent have or have not been guilty of such treason. The proof of which can only be legally established by his conviction, if he continue amenable to justice, or his attainder by outlawry if he abscond; *unless the accessory choose to waive the benefit of the law, and submit to a trial.*"

And has he not waived the benefit of the law? Has he made any objection to a trial till the conviction of the principal? Has not his submission to the trial deprived him of the power of making this objection at this time?

1 *Hale*, 623, places this subject in a very clear point of view: "If the accessory be indicted, either alone or together with the principal, process of outlawry shall not go against the accessory till the principal be attainted or outlawed, neither shall he be put to plead till the principal appear." "The accessory shall not be constrained to answer his indictment till the principal be tried, *but if he will waive that benefit, and put himself upon his trial before the principal be tried, he may; and his acquittal or conviction upon such trial is good.* But it seems necessary in such case to respite judgment till the principal be convicted and attaint; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him; but if he be acquitted, that acquittal is good, and he shall be discharged." Here the doctrine is plainly set forth. It appears that the principal and accessory may be tried together; and, therefore, the accessory cannot require a record of the conviction of the principal. He may relinquish the benefit, and put himself upon his trial before him; by which he can sustain no possible injury, because the judgment may be respited till the conviction of the principal.

The same doctrine is further explained and confirmed in 2 *Hale*, 224: "In ancient time, if the principal appeared not, the accessory was not put to answer. But of later times the accessory, if he appear, hath been arraigned and put to plead; but process against the inquest and trial ceaseth till the principal come in or be attaint by outlawry. But the accessory may pray process against the principal, *et renuntiari juri pro se introducto;*" *and his consent makes it not error;* and therefore, if the accessory be acquitted before the principal tried, it is agreed that it is a good acquittal; and by the same reason if he were convict, it is a good conviction; yet no judgment shall be given against him upon that conviction till the principal tried." The accessory, if he submit to trial, cannot require the production of the record of the con-

viction of the principal. If he do not choose to submit to trial, he may insist on the production of such record; and he cannot *then* be put on his trial without it.

But a principal in the second degree cannot object to his trial, though the principal in the first degree has not been tried. He cannot succeed in such an attempt as I have already shown. (See also 2 *Hawk.* 322.)

By declaring this objection too late, the accused sustains no inconvenience. Admitting him to be a principal in the second degree, and not punishable till the conviction of Blannerhassett, I ask, what inconvenience, difficulty, or hardship could he sustain? What can he want by a fair trial that he has not now, as the judgment may be respited till the principal from whom the guilt is derived be convicted? The judgment may be arrested, according to the authority of Hale, just quoted, till the conviction of Blannerhassett.

It will, perhaps, be said, "How could the accused do otherwise than submit to a trial, being indicted for levying war, and of course calculating that he was to be proved a principal in the first degree?" The answer is obvious and conclusive, as furnished by the constitution of the United States, which prescribes this to be the form of indictment against him. It charges him with levying war against the United States; and this is the only charge which can be constitutionally made against him. The indictment cannot be formed in any other shape. If, therefore, he wished to avail himself of the necessity of producing a record of the conviction of the principal, he ought to have proceeded as they do in such cases in England. If in Great Britain a derivative offender wish to avail himself of this rule with respect to the trial of the principal offender, he objects at the outset that he does not choose to be tried till the principal offender be convicted; and the court then postpones the trial. If the rule is to be resorted to, it ought to be so as to produce the same effect as there; and not by a motion in the midst of a trial to exclude evidence. In Great Britain nothing is said after going into trial to prevent the facts from being proved before the jury. The objection, as now made, is much more formidable here than in that country. There it only delays the trial; but here it is

urged not to delay, but to defeat, by excluding evidence directly relevant. What a dilemma does it not involve! What difficulty does it not produce! Is he to be released without a trial? or are the jury to be discharged? Is he to be tried on one half the evidence, or on no evidence at all? This objection might as well have been made at the commencement of the trial as now. See how improperly the gentlemen avail themselves of these common law rules! In Great Britain, where the rule originated, and is so expounded as to produce no practical inconvenience, the accessory must call for his record before the trial begins, not after it is commenced. But here he calls for it after he has submitted to a trial, and the jury are sworn, and have heard part of the evidence. The result, then, must be, if his motion succeed, either to discharge the jury or reject the evidence. Surely the objection, then, comes too late.

It may be said that the indictment ought to have charged the prisoner with having levied war, being absent. According to the situation in which he stands, he may either submit to a trial or require the production of the conviction of the principal. But the answer to this remark will be found under the third head of inquiry. I will only observe, now, that in this country it is not necessary that the indictment should distinctly state that the person charged with levying war was actually absent. If the evidence be excluded on this ground, the trial will be defeated; but if we go on, and the prisoner be entitled to the benefit of this principle, he can have it by respiting the judgment; but the trial is as fair now as it will be hereafter.

I have always considered it as a sacred principle that all the evidence relevant to the point in issue ought to be heard by the jury. The accused is not at liberty to introduce that objection in the midst of a trial. I call upon them to produce a one single case to show their right to make this objection at this particular time. I am confident they can produce no such case.

If the prisoner say that there is a point or fact which must be proved before his conviction, the evidence cannot be stopped on that account. There is no example in all judicial history of excluding relevant testimony from

being heard by the jury. In Mitchell's case, 2 *Dallas*, 348–356, the attempt might have been made, if legal. There was only one witness to the overt act—the attack on General Neville's house. One witness only proved positively that he was there. He was seen by others going to the place; and another witness said it ran in his head that he saw him there. So that the overt act was in fact only proved by one witness. Yet there was no call for proof of the overt act first, or to exclude evidence. There was a general examination of the testimony. The rule which authorizes the prisoner to call for evidence of the overt act where laid, before you go into another county, is no exception to the general rule, because until the evidence on the first be given, the other is not relevant. Nor is any exception furnished by the rule which requires that before evidence of the act of another person is given against the accused, the connection between them must be proved; because until such connection be proved, such evidence is not relevant.

The third position which the gentleman undertook to establish was, "that the fact must be proved as laid; and as the indictment charges the prisoner with levying war on Blannerhassett's Island, evidence which does not prove him to have been on the spot is inapplicable."

On this ground a motion is made to exclude the residue of the evidence of the United States; assuming that there will be no evidence to prove that he was on the spot. Now, suppose, before any witness was examined, they had thought proper to assume this same position, founded on my opening statement; could they not on the same improper ground have excluded all investigation, by a motion to exclude all evidence whatever? So monstrous a proposition cannot be supported. But admitting the principle to be true that the fact must be proved as laid, it does not follow that the evidence is to be excluded. The very objection implies that evidence has been heard. How else could it be shown that there was any variance between the evidence and the charge stated in the indictment? If there were such variance, a motion might be made to the court to give its opinions to the jury to attend to that variance, and regard only the proper evidence. If the evidence be relevant to the charge, it must

be heard. If it do not prove the charge,—that is, if there be a material variance, — still it must be heard ; and the party may state the variance and immateriality of the evidence, and move the court to instruct the jury thereon. But as the jury have a right to decide even in opposition to the opinion of the court, they must have all the evidence before them.

But the inference is not warranted that the evidence here is inapplicable, because the fact must be proved as laid ; for he is not stated to have been on the spot, on Blannerhassett's Island, but to have levied war on the island at such a time with such a view. Evidence which proves the fact that war was levied on Blannerhassett's Island is directly applicable to the indictment, and completely supports it.

But let us examine the doctrine on which Mr. Wickham so confidently relies to support this position, and in which he said he could not fail, if he failed in the others. The idea that the indictment should state him to have been absent, in order to let in the evidence, is not founded in law. So far is this from being correct, that an accessory before the fact, who was never on the spot, may be convicted under an indictment charging him as the actual perpetrator of the offence.

It will be recollected that counterfeiting the coin is treason in England. In 1 *Hale*, 214, it is stated that "if many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all ; *and they may be all indicted for counterfeiting generally* within this statute ; for in such case in treason all are principals." See also page 238 : "Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet this much he partakes of an accessory, that his indictment must be special of the receipt, *and not generally that he did the thing, which may be otherwise in case of one that is a procurer, counsellor, or consenter.*" *East*, vol. i. 126, 127, lays down precisely the same doctrine : "As all accomplices in treason are principals as much as those who do the act, *there is nothing to remark of difference between them in respect of the indictment.*" "An indictment against a receiver of a traitor after the fact

must charge him specially with the receipt, and not generally that he did the thing; *which is otherwise in case of one who is a procurer, counsellor, or assenter.*"

The language of these authorities is clear and explicit to show that a procurer may be indicted generally of treason as the actual perpetrator of it. Gentlemen say that evidence which shows that he was not present at the perpetration of the fact, or which does not prove him to have been present, is inapplicable to this indictment; and this point Mr. Wickham, in his argument, stated to be indisputably clear; yet these authorities are directly contrary. They show that with respect to an accessory before the fact, who was never on the spot where the overt act is committed, evidence proving him to be an accessory is admissible under an indictment charging him with being on the spot, and with being the actual perpetrator of the offence. If this be law (and it appears to be clearly so, as it is laid down in very positive, plain terms, and the doctrine is reasonable in itself), it furnishes a complete refutation of this objection, though it is the main pillar of Mr. Wickham's argument. His great objection is this: that the prisoner is charged with having levied war on the island, when he was not there. The charge is in the very language of the constitution, with the addition of time, place, and object; and this is fully sufficient. The objection resolves itself into a general principle that the accused should be informed, with *reasonable certainty*, of the nature of the charge against him, that he may be able to prepare his defence.

Mr. Randolph referred to the provision in the constitution, but objected to its exposition on the principles of what we deem to be common sense. But it is the surest and safest guide on all occasions. When a man is accused of a particular offence, it ought to be so described that he may distinctly understand it, in order to meet it with his defence; for if it be doubtful or ambiguous, he may be surprised and oppressed. The prisoner is charged with having levied war against the United States, on Blannerhassett's Island, on the 10th December, 1806. It gives a knowledge of the facts intended to be proved against him. It communicates to his mind information so certain that he cannot possibly doubt. What species of certainty is

required in an indictment? The offence itself, and the time, place, and manner of committing it, must be described with reasonable certainty. Is this indictment defective for want of certainty in any of these requisites? It charges the offence minutely and particularly — the day *when*, the place *where*, and the object *for which*, the accused committed it. Let us appeal to our own understandings, and ask, what more, in reason and justice, could be required? The specification of all the circumstances, a detail of all the evidence, has never been known to be inserted in any indictment. *Foster* says, in page 194, "The overt act is the charge to which the prisoner must apply his defence; but *it is not necessary that the whole detail of the evidence intended to be given should be set forth.* . . . It is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of the nature of it, and prepare to give an answer to it." And *East* repeats the same sentiment, 1 vol. p. 121. And in pages 115, 116, he says, "Every indictment for high treason must lay the offence to have been committed *traitorously*, and should conclude against the duty of the defendant's allegiance. . . . It is sufficient if the species of treason (such as compassing the king's death) be laid to be done *traitorously*. *There is no necessity to charge every separate overt act relating thereto to be so done.*"

The indictment does not say whether he were present or absent. The fair inference is that he was present. But it is not material whether he were personally present or not. The charge laid is, that he levied war against the United States, with a great number of persons armed and arrayed in a warlike manner; and this is the overt act to which he must apply his defence. It is stated with *reasonable certainty*, and according to the constitution and the authorities I have cited. See also 1 *East*, 125, on the same subject. It has been suggested in the course of the trial, though not in Mr. Wickham's argument, that the indictment had fixed the locality of the crime to the island. From the state of the evidence, it is not material to notice it; but that idea is incorrect. The crime is laid in the county of Wood; and evidence of acts *anywhere* within the county of Wood would be admissible in support of the indictment. It would have been sufficient to have charged

it in the county; anything beyond *that* is superfluous, and, whether proved or not, is immaterial. Suppose the indictment had stated that the accused levied war in the county of Wood, without naming the island; would not acts committed on the island prove the indictment? Could the defendant's counsel in that case object that we had not charged him with levying war on Blannerhassett's Island? The indictment charging the act to have been done in the county would be true; it would be fully supported by proof of acts done on the island; acts *anywhere* within the county, whether on the island or not, would be sufficient. Is it not the same thing, when we have charged in the indictment that he levied war in the county, though on the island? Ought not all these captious objections to the indictment and evidence to be disregarded? The variance is but circumstantial and trivial. The authorities which I have already quoted from 1 *Hale*, 238, and 1 *East*, 127, prove the very same doctrine: that evidence, proving a man to be an accessory before the fact, will be received on an indictment charging him as the actual perpetrator of the offence, the variance in both cases being only in circumstances deemed unimportant. See also 9 *Coke*, 119, where A was indicted as an acccessory to B and C, for murdering D; evidence that A was accessory to B only supported the indictment; for the variance is immaterial.

Foster, in page 357; and 1 *Hale*, 437, 438, maintain the same doctrine. "Where the indictment chargeth that A gave the mortal stroke, and that B and C were present, aiding and abetting, if it cometh out in evidence that B was the person who gave the stroke, and that A and C were present aiding and abetting, they may be all found guilty of murder or manslaughter at common law, as circumstances may vary the case. The identity of the person supposed to have given the stroke is but a circumstance, and, in this case, a very immaterial one. The stroke of one is, in consideration of law, the stroke of all." Which cases prove that questions of accessories, when not too much embarrassed by technical rules, are generally determined by principles of convenience and justice. Here it is said, that if it come out in evidence that B gave the mortal stroke, and A and C aided, it will support the

indictment charging A as having given the mortal stroke, and the other two as aiding him. In these cases, a variance in circumstances, where there is no difference in substance or principle, is disregarded; and *where* Mr. Burr happened to be at the time of the commission of the overt act by his procurement seems to be perfectly immaterial. The question is, did he levy war? Was the overt act charged committed by his agents by his command?

Let us ask in what situation we should be if we had done what Mr. Wickham says we ought to have done, — if we had stated in the indictment that he had levied war, but that he was absent at the time when he levied it. It would indeed be a strange and unprecedented indictment which should state that he levied war on Blannerhassett's Island (which implies presence), but that he was not present when he did the act on it. It would have been as much as to say that he was present, and yet not present; which would be an absurdity in terms. How could the fact have been stated? I believe it would puzzle the gentleman to draw such an indictment. I believe there never was an indictment, from the beginning of the world to this day, which stated that the accused was not present at the time of committing the act. We say that he was *legally*, or *in the estimation of the law*, present, and concerned in the act of treason. If we had stated that he was absent, it would have excluded his legal, as well as actual, presence. How could we have got over this difficulty? If we had stated the fact as it appears — that though not *actually*, he was *constructively*, present — we must have given a detail of the evidence the most minute and difficult that could be conceived; which is utterly proscribed by practice and propriety, as several authorities which I have already referred to prove; and if we had so stated it, gentlemen would most probably have loudly complained of it as irregular and extraordinary.

An indictment cannot be framed by the mind of mortal man charging the actor to be absent, without involving the absurdities or inconveniences which I have stated. Such a detail of the evidence is extremely difficult to obtain, and inconvenient to state, and has never been required. No more is requisite than what we have stated:

that the accused and a number of men met together for the purpose of levying war against the United States, and did levy it on Blannerhassett's Island. These are the principles on which I contend that his third objection could not be sustained even in England.

The liberality of judges on this subject formerly, though proceeding from the best motives, promoted great injustice by the impunity of flagrant offenders. They lent an over-easy ear to captious exceptions to indictments, which this court, I trust, will not do, especially as these exceptions are taken from the common law, which is not in force here.

The remark of *Hale*, in his 2d vol., p. 193, on this subject, deserves particular attention. He says, "that in favor of life, great strictnesses have been in all times required, in points of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence; *and many gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonor of God.* And it were fit, that by the same law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

I think myself that it is essential that every man who is brought before a court of justice to answer a charge affecting his reputation or his life ought to have information of the nature of the offence, that he may understand it, and why he is brought before the court, and be able to defend himself against it, if he can. The principle is founded in common sense and humanity. If we examine this indictment, and consider the case, we shall find that all the information which he could possibly require has been given to him, and that he has availed himself of it in the fullest extent.

I stated to the court that I did not know that I should say anything with respect to the fourth position laid down by Mr. Wickham; that no parol evidence can be given to

connect the prisoner with the assemblage on Blannerhassett's Island until we show an overt act committed by them; and that that assemblage was not an overt act of treason. I will, however, make a few remarks. I will first state two or three passages in the opinion given when the prisoner was examined, corresponding with the opinion of the Supreme Court, to one or two of which Mr. Wirt did not refer, and for that reason only I shall refer to them.

There is no difference between the opinion of the Supreme Court in the case of Bollman and Swartwout and that delivered by yourself on the examination of the accused. You state in the latter opinion "that this plan, if consummated by overt acts, would amount to treason, no man will controvert; but it is equally clear that an intention to commit treason is an offence entirely distinct from the actual commission of that crime. *War can only be levied by the employment of actual force.*" What is meant by the words *the employment of actual force?* Not fighting a battle, but preparing the means to make war. The meaning is explained in the next sentence: "*Troops must be embodied, men must be assembled, in order to levy war.*" Do not these words amount to a declaration, that when troops are embodied, and men assembled, the war is levied? When it says that these things *must* be done in order to levy war, when the question is *how* war shall be levied, is it not fair and reasonable to conclude, that when they are done, the war is levied? Is it not equally correct to presume, that if anything more were deemed essential to the consummation of the act of levying war, it would have been added? The idea that an assemblage of men for a treasonable purpose constitutes treason occurs several times in the course of the opinion: "It has been already observed, that to constitute this crime, troops must be embodied, men must be actually assembled." This sentence is, in fact, a plain declaration of your opinion, that embodying troops and assembling men constitute treason. Nearly the same phrases repeatedly occur, all expressive of the same idea: "The assembling of forces to levy war is a visible transaction. . . . When, at this late period, no evidence that troops have been actually embodied is given," &c. The same idea is expressed very often in the opinion of the Supreme Court; but it has

been so fully commented on already that I shall add nothing. They say that the question whether this were an act of treason or not must be decided by this court. The principle that the court is to supersede the jury in the decision of questions of facts is monstrous. The decision of this court this term is directly in its teeth: "*Levying war is a fact which must be decided by the jury.* The court may give general instructions on this, as on every other question brought before them; but the *jury must decide upon it, as compounded of fact and law.* Two assemblages of men, not unlike in appearance, possibly may be, the one treasonable, and the other innocent. *If, therefore, the fact exhibited to the court and jury would, in the opinion of the court, not amount to the act of levying war, the court would not stop the prosecution, but must permit the counsel for the United States to proceed to show the intention of the act in order to enable the jury to decide upon the fact coupled with the intention.*" This very clearly and decidedly proves that the court cannot decide this question. It was said by Mr. Wickham, that if the doctrine for which we contend could be sanctioned by the court, a precedent would be established which would be fatal to the liberty and happiness of the people of this country; that it would be more dangerous than any ever introduced in any country. He seems to be alarmed at our temerity, and endeavors to persuade us to desist from pursuing the object we have in view. He admonishes us that the principles and doctrine which we advocate to maintain the prosecution are totally subversive of public liberty. The pathetic and animated description which the gentleman gave us of anticipated calamities, and the fervor of his zeal in their deprecation, had a considerable effect on my mind, and induced me to examine minutely whether they would lead to those fatal consequences which he so eloquently depicted. He trembles for his country, for himself and his posterity, lest we should succeed. I have looked into the subject according to my best ability and judgment, and endeavored to discover whether any great evil or mischief would ensue from the principles which we have advocated, or the measures we have recommended. I, too, am a citizen of this country, and the father of children, for whose happiness

and welfare I feel a solicitude as lively and affectionate as any parent can feel. To the true happiness of my country, I hope, I know, that I am sincerely and ardently attached. But I see no danger. I apprehend none for myself or my posterity. I am perfectly willing to risk my own life, liberty, and happiness, and those of my posterity, on the propriety of the principles which we recommend. Let them avoid entering into traitorous conspiracies and designs fatal to the liberty and happiness of their fellow-citizens, let them avoid traitorous assemblies, overt acts of levying war, and they will be safe. They cannot be hurt. No individual need apprehend any danger from accusations of treason, either to himself or his posterity, if he and they be innocent. Before any man's life can be in jeopardy, he must not only be concerned in the unnatural and ungrateful scheme of subverting the government of his country, but he must take one active step to carry it into effect. It is unnecessary to mention the fate which any man deserves who attempts to destroy such a government as ours, or to destroy the tranquillity and happiness of the people. Let every man pursue the paths of integrity and patriotism, let him avoid schemes of unprincipled ambition, and he will not even be suspected. I hope and believe there is no danger on this score. There is another danger which the gentleman did not see, which he did not wish to see — a subject which presents to the mind of the patriot infinitely more danger and alarm for the public liberty than can possibly result from any misconstruction of the constitutional crime of treason. I mean the effect of the attempt he was making to destroy the great bulwark of freedom. Could he not see that he was throwing down one of the great bulwarks of public liberty? that he was attacking a system on the preservation of which depended our freedom, our lives, our property, and everything valuable and sacred — the trial by jury? This is the view in which this motion ought to be considered. This is but a repetition of the sentiment which I expressed yesterday, that I considered the preservation of the trial by jury, in all its purity, as infinitely more important to the happiness of this country than that the doctrine of treason should be clearly defined and duly restrained. On this subject I must be excused for feeling

and expressing great anxiety. I consider the jury trial as the main pillar of the temple of freedom; if it be impaired, the whole edifice may totter to its base. It is the first column of our free constitution and government. If you undermine it, the whole may fall into ruins. I said yesterday that it would be infinitely better for a judge to remain a thousand miles on this side of the line which limits the rights of juries than to go one hair's breadth beyond it; and that if he touched it, he would undermine civil liberty. I may truly add, that if he pass it, he falls down a precipice; and with him fall the liberties of the nation. The gentleman made another remark, to which I beg leave to call the attention of the court. I appeal to them whether the principles on which we have gone warranted his injurious anticipations. Without waiting to hear one word in support of the doctrines which we professed to maintain, he said that we must contend, before we could succeed in the prosecution, that the constitution was a dead letter. Have we done so? Have we not advocated the constitution in all its extent? Have we not maintained it in the most perfect purity? Have we not uniformly contended for its inviolability in every respect? Sir, we have contended for that construction which can alone save it from violation, and give it stability and permanence. Yet the gentleman said that we could not oppose his argument without contending that the constitution was a dead letter! The gentleman knows that he was incorrect. I would agree to die ten thousand times over before I would dare to advance so horrible a proposition. It was the language of zeal, mistaken zeal, uttered in the warmth of debate. It was a spark of momentary irritation which is common to that gentleman with most other men, but inconsistent with his usual sentiments of politeness and friendship, which I hope now have resumed their place in his breast. I do not wish to hurt his feelings; but I must add that he went still farther. He stated, that if we opposed him, we must adopt the doctrine established by the cruel Jeffreys, and apply it against the accused; not the doctrine of the execrable Coke, but of the bloodthirsty Jeffreys. Have we quoted his opinions, resorted to his authority, or advocated his principles? Sir, I never did, I never will, I

never can advocate opinions and principles which I abhor; and I firmly and cordially unite in handing down the name of Jeffreys with my execration to all posterity. Let that name be consigned to merited and eternal infamy. No man holds it in greater detestation and abhorrence than I do. *Jeffreys*, the disgrace of the English bench, whose name is not mentioned even in that country but to be despised, will never be spoken of in this country but in terms of the deepest reproach.

Sir, we have never gone one step out of the right path as far as we could trace it. We have confined ourselves within the fair exposition of the constitution of our country, according to our several capacities. I may be mistaken; but I have heard nothing yet to induce me to think that my exposition of the constitution and laws is incorrect. I have not stated a single fact which I did not believe to be true, nor urged a single argument which has not operated conviction on my own mind. Nor have the great and persevering exertions of the counsel of the accused, with all the splendor of their talents and the depth of their researches, enabled them to advance a single principle of defence which, in my estimation, hath not been amply refuted.

With this view of the subject, and believing the liberty, prosperity, and happiness of the people to be strongly connected with the decision of this case, I cannot conclude without expressing my hope that the motion will be rejected; that according to the opinion of this court on a late occasion, they will not stop the prosecution, but permit us to introduce the rest of our witnesses in order to enable the jury to decide upon the fact coupled with the intention.

After Mr. Hay concluded, a short and desultory conversation took place among the counsel of the accused.

Mr. Martin, who was expected to reply, was not then ready.

Mr. Randolph said, that though he had not intended to speak any more on this question, yet he would reserve to himself, with the approbation of the court, the liberty of answering some observations which he had heard to-day, if what he felt should not be expressed by other gentlemen; that he had heard some things said in a high tone

respecting the power of the court to grant the motion, and the danger of usurpation on the rights of the jury; that he would take upon himself to vindicate the power of the court, if he found it necessary, after other gentlemen should have spoken.

Mr. Charles Lee then addressed the court as follows:—

May it please your Honors. Several considerations are necessary in this inquiry. I shall endeavor to establish four points to satisfy the court that our motion is founded on law, and ought to be granted; but before I proceed to the arrangement or division of the subject, I will make a few preliminary remarks.

This is an objection to testimony which is deemed by Colonel Burr and his counsel to be illegal and improper. When this motion to exclude it was made, I considered it as an ordinary step in legal proceedings, an objection to the admission of improper testimony, which promised nothing very novel or interesting, a motion founded on a principle never denied to be correct, and familiar in every day's practice. It would seem that in such a motion nothing could occur to produce surprise, or excite the feelings of the gentlemen to whom we are opposed. Who can deny the principle that either party in any cause, civil or criminal, has a right to object to the admission of unlawful testimony? In what courts have they practised without hearing such motions frequently made? Appeal to their own experience, and they will inform you that questions of this kind are constantly made, and as constantly decided, in all the courts in which they practise. But when this ordinary motion is made, you are informed that the power of the court does not reach it; that you have no right to decide it; that you are bound to avoid the bulwark of liberty; that if you grant the motion, you transcend the line of your jurisdiction, and usurp the powers and rights of the jury by deciding upon facts! Is it not sufficient to state our objection to satisfy your honor and the gentlemen themselves that you are not called on to decide facts? Is it possible that the gentlemen could believe that we called on the court to decide any fact? to *snatch* from the jury (to use his own phrase) the decision of this case? Whatever may be the deter-

mination of the court, whether the motion succeed or not, the jury are to render their verdict on the evidence which, according to the rules of the law, is submitted to their consideration.

Our motion, which is so simple and plain, and founded on so clear a right, has been misunderstood; and being so, I wonder not that it has been misrepresented. Our motion is not to exclude any legal testimony; but we call on the court to *arrest illegal* testimony.

It has been represented that the testimony which we object to is of transactions, of acts, done in Virginia. We have never had such a thought. Our objection is only to irrelevant testimony. We cannot agree that every act in the whole course of his life, of a private as well as of a public nature, should be publicly exposed, and become the subject of judicial investigation. When they endeavor to prostrate everything that is dear to us, we cannot submit to encroachments on our important rights, or waive great and beneficial privileges. What could have put it into the gentlemen's imaginations? What could have induced them to consider it in that point of view? When we first made the motion, we stated to your honors that it was to illegal testimony which we objected.

But, say gentlemen, can you stop the evidence after the trial has been begun before the jury? Yes; I say they can; and we know that the court only has a right to stop the evidence when it is illegal. If you cannot stop it, who can? Is there no rule for the regulation of trials, and of evidence? Is it all uncertainty, squabbling, caprice, and chance? It has been the common use to stop illegal testimony from being heard by a jury, not only in civil, but in criminal cases. There is scarcely any distinction between the rules of evidence in civil and criminal cases. It belongs to the court to regulate these rules. I know nothing more favorable to liberty than the power of the court to interpose with respect to evidence. By its means, it can prevent any individual from being unjustly oppressed; and though it can prevent, it cannot practise oppression, without corruption; which ought never to be presumed.

The gentleman then said, that in substance there was no difference between the opinion which we desire you to

give and that for which Judge Chase was impeached. It was very kind in the gentleman to remind the court of the danger of a decision of the motion in favor of the prisoner; a decision like that which had already produced the impeachment of another judge.

Mr. Hay. — The cases are different. What I said was only said to put Mr. Botts right in his misrepresentation. It was innocently said, and compatible with the highest respect for the court; not with the design which the gentleman (I will say not very candidly) insinuates.

Chief Justice. — I did not consider you as making any personal allusion, but as merely referring to the law.

Mr. Lee. — The gentleman plainly insinuated the possibility of danger to the court, from a favorable opinion to the prisoner; because he said that the opinion which we claimed for him was the same in substance as had occasioned the impeachment of one judge already. It certainly would not be unfair to infer that it was intended to show that the same cause might again produce the same effect. The idea, then, of danger to the court from a decision in our favor, when there was no danger, we were bound to repel, whatever might have been the intention with which the observation was made. The gentleman having brought the point before the court in order to prove the impropriety of our argument, and to make the court believe, as we have a right to presume, that the question was different from what it really was, it was at least as fair in me to repel it in defence as it was in him to urge it as an argument in prosecution, and as much my duty to show its fallacy, as it would be to explain away and repel any arguments magnifying or destroying evidence. I hope I shall pass over the rest of the argument in a manner more satisfactory to the gentleman. It is not my intention to misrepresent any gentleman's argument, or to make improper conclusions with respect to their motives. I do not charge him with any improper designs. I only showed the consequences flowing from his argument as naturally as water would run from a fountain.

You are called on to decide on our motion. Have you the power to decide on it or not? Is it encroaching on the rights of the jury? Can liberty be endangered by it? If it be a power which belongs to you, it becomes

us to show that it should be exercised; that it is your duty to exercise it. The question is, What is the proper interpretation of *levying war?* This question belongs to the court. When that question of law is decided by the court, the jury will have to decide whether the facts proved have brought the conduct of the prisoner within that definition or not. The power of regulating evidence according to law is not, and cannot be, denied to belong to the court. Does treason make an exception to the general power of the court as to evidence? This is the first time that the objection has been made. That there can be no such objection sanctioned by the law can be demonstrated in a very few words. Suppose, in the case of burglary, a question were to arise what constituted burglary; the court would be the proper authority to give a definition of it. It would have to decide that burglary consisted of breaking and entering by night into the house with an intention to commit a felony; that there must be a breaking and an entry; that it must be in the night, and with an intent to commit a felony. Suppose the case of a prosecution on an indictment for burglary; suppose, on the trial of the accused, there were evidence to show that he penetrated into the house not in the night time, but in the day time, and there were no evidence to prove that he broke into the house in the night; ought not the proceedings in such case to be arrested? Would it not be the duty of the counsel for the accused to move the court to prevent any further evidence from being introduced? Would the counsel for the prosecution be permitted to proceed in the proof of other points? If the fact be, that the house was never broken in the night time, ought the time of the court to be taken up to prove the intentions of the party to have been to break it open, or to prove any other persons being in the house, or any other circumstances? No, surely; because such evidence would be irrelevant to the subject before the court. It would be losing time without any object; as the essential fact of its being done in the night could not be supported. Would not the court stop the testimony in that case as irrelevant.

Suppose it was a prosecution for maiming; and on the trial no evidence could be produced to show that the de-

fendant disfigured the party supposed to be maimed, in the manner described by the legislative acts against that crime, or suppose it appeared that he was not present; when the essential part of the proof was clearly wanting, and could not be proved, ought the trial to proceed? Ought evidence of ill will, hostility, or threats to maim the party, to be admitted? On what rational principle could the trial be continued?

We will suppose a prosecution for a riot. According to the definition of a riot the law requires that there should be an assemblage of persons to a certain number, who should do some act of violence. Now, I will suppose that Colonel Burr was indicted for a riot; and on the trial there was evidence to prove that there was a riotous assembly, but that Colonel Burr was not there; would the court receive any evidence on the part of the prosecution to prove that he was aiding and abetting the riot? or any evidence which did not show that he was personally present at the riot? An aider or abettor of a riot cannot be. To *commit a riot* the person must be *actually present.* He must be a *coactor* in *the riot.* The law makes aiders and abettors in riots innocent. It secures to them impunity, because there are no accessories in misdemeanors. In this case of the riot, if there were no other evidence, would testimony of the intention to procure, aid, abet, or counsel, be admitted? Would it not be the duty of the court in that case to arrest the irrelevant testimony? But suppose, further, in the case of the riot, it was proved that there was an assemblage of men, but no act of violence; and gentlemen prosecuting the accused would say, "This assemblage of men, in which Colonel Burr was, committed no act of violence; but we will produce evidence to show that he had the intention, and went thither to commit violence:" would not the court stop the evidence? Most certainly it would be the duty of the court to prevent the further waste of time by admitting testimony entirely irrelevant; for as there was no violence, there could be no riot. There is another consideration; a case which has some relation to treason. I mean the case of an unlawful assembly. If there be an unlawful assembly, it is a clear case that no man who is absent can be guilty of a participation in

such unlawful assembly. His absence places him on the ground of innocence. Would it not be absurd that a man should be brought to answer and be punished for being in an unlawful assembly when he was one hundred miles off? Suppose Colonel Burr were indicted for having been in an unlawful assembly, and it appeared on his trial that he had not been there; would gentlemen be allowed to produce any evidence whatsoever with respect to Colonel Burr? Would not the court say, that the "*sine qua non*," which must be proved, is his *presence at the unlawful assembly?* Where is the proof, then, to support the charge? If it were admitted that he was absent, the testimony would be stopped, because it would be collateral and irrelevant. If in all those cases, the court have the power, and be bound to exclude all further evidence, because it would be irrelevant and illegal, it has the power on the present occasion to prevent the admission of any further exceptionable evidence; because it is equally irrelevant and illegal as the exceptionable evidence would be in these cases. The court in all cases can regulate trials, and prevent the admission of illegal testimony. The court, then, is not called *to decide a fact*, but to exclude testimony which has been improperly offered; because we conceive that the assemblage on Blannerhassett's Island was innocent and lawful, and because we take the facts for true, precisely as the witnesses have stated them. A question of law arises: Do these facts, thus taken for true, make or levy war? If not, will the court allow testimony to connect him with an innocent assemblage to be given in evidence against him?

It is that point of view in which the subject is to be considered, whether the facts found or admitted to be true make an innocent or criminal assemblage. Is not this the province of the court? Is this assemblage an overt act of levying war, the facts being all proved or admitted?

This motion might have been made long before now; but the postponement, if the right exist, is no reason why we should not exercise it at all. We had the right, and never intended to abandon it. We now claim and exercise it.

Gentlemen speak much of the other evidence which they wish to introduce, and of its important effects if

introduced. Among these, they have candidly stated that they intend to offer confessions and declarations, as well as acts elsewhere, of Colonel Burr.

The conversations of Colonel Burr, at other times and places, and his acts elsewhere, we contend are inadmissible. It was said by one of the gentlemen who defend with me, that the words of the accused are not admissible as evidence against him. We mean to take that position, with this qualification, that words *not accompanied by acts*, wheresoever or whensoever uttered, are inadmissible; and that declarations or words spoken at other times and places, and about other transactions than those in issue, ought not to be introduced.

With respect to any acts of Colonel Burr elsewhere, we object to them; because we are told in the law that every crime shall be tried in the district where it is committed. If in Virginia there has been no levying of war, and they wish to prove a levying of war in Kentucky, New Orleans, or the Mississippi territory, we object to its admission, because it relates not to the crime which is in the indictment. It is excluded by the constitution. Whether this testimony with regard to declarations and acts elsewhere is to be rejected or received, is certainly not a question of fact, but of law. We object to the acts elsewhere on the constitutional ground just mentioned; and we object to the declarations or confessions as wholly unwarranted by the constitution, unless they are accompanied with, or explanatory of, overt acts within this district. Yet gentlemen say that the court is called on to decide a matter of fact; whereas the truth is, that the jury are yet to decide on all legal evidence.

After these general observations, I shall make some remarks in a more connected manner. I shall take positions different from those taken by the gentleman who so ably opened this defence, but tending to the establishment of the same principle — the propriety or the necessity of rejecting illegal testimony. Though I propose, for the better elucidation of the subject, to divide it into four heads of argument, yet the principal objections to the admissibility of the evidence may be reduced to two: that the acts which are charged upon the accused do not in themselves amount to treason even if he had been

present at the spot where they were said to be committed ; and if they were treasonable, that his actual presence at the scene of action was essential to make him guilty of the crime, both by the constitution and the form of the indictment.

I propose to establish four positions, in order to satisfy the court that the testimony which we object to ought not to be admitted ; any one of which, if sustained, will be sufficient for that purpose. Consequently they may be all considered as four roads which lead to the same point — the rejection of illegal testimony.

First. The facts are not in a *legal sense* a levying of war by those who were present on the island, where they are said to have been committed ; and therefore the accused, if he had been present, could not have been guilty of treason.

Second. The constitution requires the actual presence of the party accused at the spot where the overt acts were committed, in order to incur the guilt of treason ; and as the fact was that he was absent, he cannot be guilty.

Third. The form of the indictment also requires that he should be actually present at the spot, in order to make him guilty of treason. His absence, therefore, renders him innocent.

Fourth. The accused, if he be a principal in the treason at all, is only a principal in the second degree ; and no parol evidence can be admitted against him until a record be produced of the conviction of the offender in the first degree.

The first point then, is, that the acts done in Virginia and charged in the indictment, by those who were present on the spot, are not in a legal sense a levying of war ; even although those acts may be taken in the most extensive interpretation of which they are rationally susceptible.

In order to constitute a levying of war, we suppose that at least those acts are necessary to be proved which are required by the definition which the learned counsel for the United States insisted on as correct. His own words are, "an assemblage of men met with a treasonable design, intended to be carried into effect before their dispersion." And he says that this definition is accord-

ing to the principle decided by the Supreme Court in the case of Bollman and Swartwout. He is mistaken. These were not the principles of the decision in that case. Levying war is of its own nature public. His definition seems to require that part should be in the heart and part an open deed. "*Levying war*" carries with it the idea of *action, of actual violence.* If there be no actual violence, the party must be armed and arrayed with military weapons, *in a posture of war,* ready to act for the purpose of committing violence. If there be no actual violence, no array, no weapons, no posture of war, I say there can be no levying of war under any circumstances whatever.

I hope it will be permitted to contradict what is laid down in the English authorities, by what has been determined in our own country. I admit that there may be such a multitude armed with clubs in so great a force as to supersede the necessity of arms or military weapons. But such a multitude is considered as in a posture of war, and capable of effectuating their object.

Let us suppose the instance, mentioned by the learned counsel for the United States, of ten thousand men in detachments of from five hundred to one thousand, marching without arms to the Capitol, to put an end to the government of the United States, expecting to get arms at the city of Washington; that they march in such numbers and order that the constituted authorities dare not to oppose them; but without committing any act of violence, and without carrying their intention into effect, they separate and return to their homes. I say this would not be treason; nor can any authority whatever be adduced to show that it would amount to levying of war. War speaks its own language, by open deeds, by acts of public hostility. There must be some act of violence, with a declared intention of acting in defiance of the public authorities. They must be armed; and they must march for the purpose of subverting the government. If a body of people meet in great numbers, and carry terror wherever they go, but are unarmed, and commit no act of violence, however improper or even traitorous their intentions may be, it cannot be called levying of war in the sense of the constitution. But it is a mistake

of gentlemen to suppose that we say that there can be no levying of war without a battle. We do not contend that there must be a battle; but we insist, and all the authorities, American and British, prove that unless there be a battle, or some act of violence, a body of men assembled with an intention to subvert the government must be armed and arrayed with military weapons and in a posture of war; or, if without military weapons, yet in such a multitude, and armed with other weapons, as to inspire terror, and to be still in a posture of war, or there cannot be a levying of war. But the counsel for the United States suppose that any assemblage of people, having an evident intention to subvert or oppose the government, but without any act of violence, without arms, without being in a posture of war, but inspiring terror by their numbers, will constitute a treasonable assemblage. I contend that this levying of war must appear from their acts at the place and time specified, in the district of Virginia; and unless they give evidence of acts in Virginia, their testimony will be irrelevant. But have the very learned counsel for the United States adduced a single case or point on the subject of treason in levying war to show that military weapons and force are unnecessary? Those gentlemen have only adduced a few cases on that branch of treason (for levying war); and I should wonder at this, when they read so many English authorities on the subject of compassing the king's death, did I not know that there are but few cases on the subject of treason for levying war, compared to the vast number for compassing the death of the king. In these latter cases the crime consists in the intention; so that in every conspiracy against the government, indictments will be against the conspirators for compassing the king's death; but the reason why there are so few authorities on the other branch of treason, for levying war, is, that prosecutions for this species of treason only take place after there has been an actual rebellion. Examine all the British authorities, and you will find this to be the true cause of the frequency of indictments in the one case, but not in the other. But it proves unequivocally that the government has seldom or never prosecuted for *levying war*, except in cases of *actual*

rebellion. As to American authorities, there are but very few; in the prosecutions against a few persons, for the parts they took in the insurrections in the years 1793 and 1798. In these rebellions, no persons but the authors and actual perpetrators were ever considered as having committed an act of levying war against the government. No person was prosecuted that was not present and actively engaged in it. No person who was not there was ever thought of as the object of prosecution, howexer deeply he might have participated in the conspiracy. No question was made with respect to constructive presence. If there had been any prosecution against any person who on trial had been found not to have been at the scene of action, I believe there would have been no distinction made between legal and actual presence. There would have been no attempt to fix the punishment of treason on absentees. This is the first time that such a distinction was ever made in an insurrection. But this is not the language of the law; it recognizes no such distinction. A man may be connected with another in consequence of this *legal* presence, which the law admits; but then he is of the *same* party, acting at the same *time;* and as to place, it may be said to be in reality the *same* place, though he is at a small distance, ready to *give immediate assistance* to the actor. As in the case of murder, he is deemed a principal in the first degree who gives the *mortal stroke.* Those associated with him, who may be at a small but convenient distance, ready to give instantaneous aid, are called principals in the second degree, and said to be *legally present.* But in all such cases, those who are said to be constructively present are of the same party. They set off and return together, and are only separated for a short space of time at a small convenient distance, where instant assistance can be given by the one to the other. The cases of legal presence mentioned in the books are very different from this case. But this doctrine of construction ought not to be extended to treason. They contend for the extension of constructive presence so as to apply it to treason. But no construction should be applied to enlarge the sphere of treason. It should be carefully excluded. The door ought not to be opened to constructive treason. If you open it to this

part, you open it to every other part. I think the court will hear this argument with a perfect understanding of the subject. It must well know that it was not intended to admit constructive treason into this country. If ever a people ought to determine to exclude this pernicious doctrine, it should be the people of this country. Knowing its destructive effects in other countries, they should avert from themselves so dreadful an evil. They have expressly and guardedly done so in their constitution.

It was stated by one of the gentlemen on the other side, that the principal ingredient of the crime of levying war consisted in the *intention;* and that a small matter, a trivial deed, would be sufficient to constitute an overt act. Here, again, I express my dissent from that doctrine. There must be some public act of violence, some act of public hostility, or, what I say is tantamount, some posture of offence, ready to act with violence; not mere declarations unaccompanied by acts. I protest against this doctrine, and again repeat, that levying of war does not consist principally of intention, but of open, unequivocal acts of war. I will not confine it to acts of violence by individuals, such as murdering a man, beating his person; but acts of force and violence carried on by the assembly or multitude themselves.

On this question of levying war, the opinion of the Supreme Court has been referred to; and particular sentences have been selected, as having a decisive effect, in favor of the prosecution. Suffer me to say that the jurisdiction of the Supreme Court is confined to civil cases; that it has no jurisdiction over this case. The Supreme Court has decided that it has no jurisdiction in any criminal cases whatsoever, with the single exception of writs of *habeas corpus*. Its decisions are not of that authoritative kind, in relation to inferior courts, which the decisions of superior courts, having the right of revision, must always be. This is a substantive, independent court, whose decrees or judgments in criminal cases cannot be reviewed by the Supreme Court; but I will admit that any opinion or *dictum* from so high an authority ought to be respected. I mention this to show that the decisions of the Supreme Court, in similar cases, however entitled to respect, have not a binding force to control

inferior courts. But let us examine the opinion given by the Supreme Court in the cases of Bollman and Swartwout. Let us see whether it be not perfectly consistent with the doctrine for which we contend. I hope the gentlemen will forgive me for telling them that it does not lay down the doctrine precisely and conclusively, which they allege it does. When deliberately and duly examined, it will be found to be far different from what they have represented it to be. That opinion professes one point: that without an assemblage of men, there can be no war; and because it has decided that there must be an assemblage of men to constitute war, gentlemen contend that it was its intention to say, that it is a *levying of war.* But surely it does not follow, because it has said that an assemblage is necessary, that it is *all* that is necessary. An assemblage of men may very well be *one* essential ingredient, without constituting the *whole act* of levying war. When the case of Swartwout was before your honor and the rest of the court, his counsel insisted that there was not evidence to charge him with having committed this crime; and in order to make this position out, they did not find it necessary to discuss that doctrine or branch of high treason. There was no proof of any assemblage of men; nor was it necessary to decide the effect of such an assemblage. It was, indeed, stated that great bodies of men from New York and other northern parts were engaging and on the way proceeding to New Orleans. It was anxiously and pressingly asked by the prisoners' counsel, "*Show us* the *time*, the *place*, the *manner*, *when*, *where*, and *in which*, *these acts of levying war have been committed.*" The counsel for the prosecution could not show any assemblage of men anywhere. This was sufficient for the counsel of Swartwout; and that the court did confine itself to that point of an assemblage or its effect, will appear from a critical examination of the opinion itself; and if this opinion be considered with reference to a few specific ideas, I think this is the true construction. First, if it be considered with reference to the situation of those men then before the court, or, secondly, with regard to the subject-matter, we must be satisfied the question of an assemblage was or was not made. We ought not to lay hold of any vague

expressions to make the court to *appearance* decide that to be law, which has never been thought to be law. As I have just observed, proof of the assemblage of men who had levied the war was demanded, and could not be produced. The court delivered its opinion in reference to the statement and proof, which manifested at most no more than an incomplete state of insurrection. [Here Mr. Lee read the ninth section of the opinion of the Supreme Court in the cases of Bollman and Swartwout; which see quoted before. He then read the sixteenth section, &c., as follows:] "To *complete* the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force would have been unquestionably a design, which, if carried into execution, would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution, would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." It is not going on any new idea of treason, but means to decide that to be treason which had been adjudged to be so before, and which the Supreme Court itself declares it is deciding according to the doctrine of treason decided by Judges Patterson, Chase, Iredell, and others. It said it was determining no new doctrine of treason. That this is the candid construction, will appear by considering all its parts together. But the two next sections ought to be deemed decisive on this point. "In conformity (it says) with the principles now laid down, have been the decisions heretofore made by the judges of the United States." "The opinions given by Judge Patterson and Judge Iredell, in cases before them, imply an actual assembling of men; though they rather designed to remark on the purpose to which the *force* was to be applied, than on the nature of the *force* itself. Their opinions, however, contemplate the *actual employment of force*." "Judge Chase on the trial of *Fries was more explicit*." [Here Mr. Lee read the opinion of Judge Chase in the next section; which also see quoted before.] An examination of the opinions

of these judges, referred to by the Supreme Court, will disprove the construction of the counsel for the United States, and confirm that for which I contend. In the case of Mitchell, decided in the Circuit Court of Pennsylvania, reported in 2 *Dallas*, 348, Judge Patterson, in his charge to the jury, having stated what appeared to be the general object of the insurrection, and the conduct of the insurgents, speaks in relation to the prisoner thus: "The second question to be considered is, How far was the prisoner traitorously connected with the insurgents? It is proved by four witnesses that he was at Couch's Fort, at a great distance from his own home, and that he was armed. One witness proves positively that he was at the burning of General Neville's house; and another says it runs in his head that he also saw the prisoner there." This is conformable to the opinion of the judges of the Supreme Court. Here was really an act of war; not only an assemblage, but they were armed. The prisoner was armed, to make a *bonfire* of the house of the officer appointed by the government to collect the excise — an act of treason. He was at the burning of General Neville's house. He was also one of the assemblage at Couch's Fort. He was also armed at Braddock's Field. From the position which gentlemen have taken with respect to treason, they suppose that the opinion of the Supreme Court was, that a *mere assemblage*, manifesting a treasonable disposition, but without force and without arms, is a levying of war. But the assemblage here, on which the opinion of Judge Patterson, sanctioned by the Supreme Court, was founded, *used actual force;* and they laid down the law to be incontrovertible, that where an assemblage commits an act of flagrant violence to obstruct the legitimate operations of the government, they levy war. Here the assembly marched and committed acts of violence against officers of the government for the purpose of deterring them from doing their duty. It was in relation to their excise offices that these officers became obnoxious to the insurgents. It was because he was an officer of the excise that General Neville's house was destroyed.

With respect to Fries's trial, there was an *actual* rebellion against the government; direct hostility and resist-

ance to its legitimate authority. Here I think it not improper to advert to part of the argument of Mr. Sitgreaves, one of the counsel for the prosecution against Fries, which was acquiesced in because not disapproved of by the court. Speaking of the treason of levying war against the United States, in his address to the jury he says, "*It must be war waged against the United States.* This is an important distinction. A large assemblage of people may come together, in whatever numbers, however they may be armed or arrayed, or whatever degree of violence they may commit; yet that alone would not constitute treason. The treason must be known. It must be for a public, and not a private, revenge. *It must be avowedly levying war against the United States.* If people assemble in this hostile manner only to gratify revenge, or any other purpose independent of war against the United States, it will only amount to a riot." Here is a candid exposition of the law: that however armed and arrayed, and however numerous an assemblage may be, they must avowedly levy war against the United States, or they will not be guilty of treason. It is not a mere assemblage of men with secret intentions to commit war that will, with or without arms, constitute treason. It must be an assemblage of men with public and avowed intentions to make war upon the United States, with force either actually used or ready to be used. Their object must be known, their intentions avowed. If a parcel of people met together, however great their number, act so as to keep their intentions secret, there is not a single quality of war in their conduct unless they proceed to actual hostility.

We insist on this principle: that arms are necessary in all the authorities. I do not say military weapons; because a multitude with other weapons may supply the want of regular arms. But one or the other is indispensably necessary. Judge Chase, though explicit in one part of his opinion, that "some actual force or violence must be used in pursuance of the design to levy war," yet is supposed, by the counsel for the United States, in another part to contradict this opinion by declaring that arms are unnecessary. But the gentleman is mistaken. His opinion is perfectly consistent. What does he say?

That "military weapons (as guns and swords mentioned in the indictment) are not necessary to make such insurrection or rising amount to levying of war; *because numbers may supply the want of military weapons;* and *other instruments may effect the intended mischief.* The legal guilt of *levying war* may be incurred without the use of military weapons or military array." Judge Chase does not go any farther than Judge Patterson; and you must take all his opinion together, and then there is no contradiction. If they have no military weapons, they must have other arms, and they must be in such a multitude as to be able to effect the mischief without military weapons, or *they must use some force or violence.* He does not pretend to say that there should be less force, actual or potential, than Judge Patterson does. In one part of the opinion of the Supreme Court, a distinction is made between a conspiracy to levy war, and levying war; which corresponds precisely in substance with the distinction taken by Judge Chase: "To constitute that specific crime for which the prisoners now before the court have been committed, *war* must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed." So far has this principle been carried, "that it has been determined that actual enlistment of men to serve against the government does not amount to levying war." If there be no *act* which publicly announces the *intent* of the conspiracy, it remains still a conspiracy: for it is very obvious from the whole opinion, candidly interpreted, that the Supreme Court meant to say that such *an act* is necessary to convert a conspiracy into a treason; although gentlemen insist that that court is very explicit in saying what it never intended to say. They avail themselves with great dexterity of these words in the opinion: "On the contrary, if war be actually levied,—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose,—*all*

those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." *All those who perform any part* — any part in what? Not in the conspiracy, certainly, which it had declared to be insufficient, but in the *actual war.* Does the court mean to say that a man should be considered as a traitor who performs no part? The expression *perform any part* brings to our minds the idea that *something* should be *done.* The whole sentence should be taken together, and it will be then plain. Those words "perform any part," &c., apply to the *force* previously spoken of — "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose." To make it rational, it must mean that those who *perform* any part of the purpose intended to be effected by *force* — those who do the *least act of force* — are to be considered traitors. The term *perform* can only apply to an *act.* It can neither apply to the assemblage nor to the intention.

The court professes that the crime of treason should not be extended by construction to doubtful cases, and that a flexible definition, or a construction that would render it flexible, ought to be avoided. Yet it is insisted on that the construction of treason should be extended here to cases which are evidently doubtful. In some few instances it is uncertainly expressed; it may make it treason or not. But gentlemen, instead of conforming to the professed principle of the decision, not to extend the doctrine of constructive treason, claim the right of construing the words in the utmost latitude for the extension of the doctrine of treason. When the opinion speaks of an assemblage of men to subvert the government by force, how is it to be done? Certainly by actual violence. Wherever it speaks of an assemblage of men for the purpose of subverting the government by force, or for the purpose of executing a treasonable design, it means that the *force* should be applied, and that the purpose should be *executed.* It says, that "to complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design." The next member of the sentence shows

its meaning: "In the case now before the court, a design to overturn the government of the United States at New Orleans *by force* would have been unquestionably a design which, *if carried into execution*, would have been treason." This evinces the meaning to be, that the force must have been used to overturn the government, that the design must have been carried into execution, to make it treason. This opinion of the Supreme Court does not, according to my understanding of it, supersede those essentials which had always before been deemed inseparable from the commission of treason. And I hope that it is evident that treason does not consist in the intention only, without some deed manifesting the intention to levy war; and that I have shown that Mr. Hay is mistaken in his construction of that opinion; and if he be, the court will tell him so.

I intended to have referred to *Foster*, 255, to show that it is the duty of this court to interfere, and decide this question; to satisfy it that it is the exercise of its legitimate authority, and not an invasion of the rights of the jury. Here the facts are admitted. There is no real question about those facts, which are relevant to the issue, and admissible by law as evidence. The facts proved and admitted with respect to levying of war, charged in the indictment, are, that there were at the island four boats, about thirty-four or five rifles, a few muskets and pistols; but all not near equal to the number of men; and all these men (Blannerhassett and Tyler excepted) unconscious of any treasonable design. Now, one question of law, which we submit to the court on these proved and admitted facts, is, whether they amount to levying war. The question, what facts admitted, or agreed to exist, will amount to the legal offence of treason in levying war? is surely a *question of law* to be determined by the court, and does not interfere with the question whether the *fact of levying war* exist, or whether the offence have been committed or not, which is exclusively to be decided by the jury. Foster says in this place, that "whether the facts *alleged by way of justification, excuse, or alleviation are true*, is the proper and only province of the jury;" but that "whether, upon a supposition of the truth of facts," the alleged offence "be justified, excused, or alleviated

must be submitted to the judgment of the court. For the construction the law putteth upon facts stated and agreed, or found by a jury, is in this, *as in all other cases*, undoubtedly the proper province of the court." I trust I have established the first position, that the facts done by those who were present are not, in a legal sense, a levying of war.

I shall now occupy a part of your time with respect to the other positions which I proposed to maintain.

The second position is, that the *presence* of the party accused at the scene of action is, by the constitution of the United States, indispensably necessary to make him guilty of the fact of levying war. In this case we lay down the broad doctrine, that in this country, there is no treason but under the constitution; that consequently there is no common law treason. When there is no other than the constitutional treason, I should suppose that this could hardly be a question; because we read in the constitution the word *only;* which excludes everything from being treason but what the constitution says is treason: "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." To advise levying war is in its essence and nature different from levying war. The constitution says it shall consist *only* in levying it; the other branch, of adhering to their enemies, &c., not being at all in question. To advise or procure levying of war is clearly distinct from levying it. Every person who can read has only to open the book containing the constitution, and he reads that *levying war* shall be treason *only*. Of course, by the adoption of this strong negative word *only*, it says that advising to levy war shall not be treason. But gentlemen tell us, that at common law, advising to levy war is treason; and that there are no accessories in treason. We answer that our constitution is in derogation and abridgment of the common law, not in affirmance of it; that it excludes entirely all common law treasons — all treasons whatsoever, except the two instances specified. The common law of England is not in force on any subject under the constitution of the United States. If advising to levy war be a common law treason (that is, a treason created by the common law), and the common

law have no force in this country, how can the common law be *said* to have created this treason in any court of the United States? Gentlemen admit that the common law, as a general system, has no force here. According to the opinion of Judge Chase, there can be no crime of which any courts of the United States can take cognizance unless it be created by an act of Congress and expressly authorized by the constitution; and the constitution has never adopted that common law doctrine which says that accessories in treason shall be considered as traitors. If it can be shown, let it be shown, that the constitution has adopted this doctrine of accessories. It is said that it is impliedly adopted. This doctrine of implication, I trust, will not be countenanced by this court. I hope to be excused for repeating that the constitution, touching the crime of treason, is in abridgment, not in affirmance, of the common law. It takes its ground independently of the common law. The statute of 25 Edw. III., from which the words of the constitution are taken, is different from it. There are many other treasons at common law which remain in force *there*, and which that statute recognizes; whereas there are adopted into our constitution only these two specific treasons, with negative words excluding the possibility of any other. An accessorial treason is a common law treason in its own nature. It exists in England because the common law exists there; but it does not exist here, because treason consists only in *levying war*. If, by the common law doctrine, accessories be traitors, the same consequence does not follow in this country that does in England. This crime, which is to consist only of levying war, and adhering to the enemies of the country, is punishable by law, according to the discretion of Congress, who may punish it in whatever way they may think proper; but the powers of Congress have not been yet exercised over it. Whether it be through inadvertence or otherwise, they have hitherto omitted to punish accessories, except in an inconsiderable degree as to those after the fact who are rescuers of persons convicted of, or committed for, treason. This court has nothing to do with it. It would seem very strange to the ear of an American to hear that a *man might be guilty at an after day;* that after the cessation

of a rebellion, a man may be guilty of an act of war in that rebellion; that after the war has ceased, there may be an act of levying that very war. Yet this part of the English law the constitution has completely excluded. By the common law, this crime may be committed, after the war has completely ceased, by receiving or giving comfort to a party who had been engaged in it. Treason might be committed on this day, in this place, in relation to some persons who had committed treason in person in the insurrection of 1793 or 1798. This common law doctrine I consider as being cut up by the constitution. If one common law treason be cut up, all are cut up; there is no common law treason. It is only by construction and deduction that any common law treason can be admitted. If one constructive treason be admitted, all may enter. If it be admitted that an accessory before the fact, an adviser or abettor, be constructively a traitor under the constitution, by the same common law rule of construction, an accessory *after* the fact, a mere receiver or comforter of a person deemed to have been a traitor, may be punished as a traitor long after the termination of a war or the suppression of an insurrection. I know no difference between a procurer or aider before, and a receiver and comforter after, the fact in treason. The same rules of decision apply to both. Either both exist, or are cut up by the roots. Then, sir, if, according to the English law, accessorial treason be the creature of the common law, it has its existence only with the common law. The person who procures treason to be committed, who plots some project to subvert the government, who advises, who hires, who counsels, who commands, or who abets a project to subvert the government, is a traitor, according to that common law. If all these be created by the common law of England, they exist only there. But if the common law have no existence here, the doctrine of accessorial treason has no force here.

Gentlemen say that the common law has no force here as a general system; but they say that certain parts of it have been adopted. They will look into authorities to see the meaning of particular expressions. They refer to the common law for the meaning of words. They say that crimes have been created by using such and such words

in the constitution. What is levying war? It is said, it consists of such and such facts, because it is so according to the English authorities, which are founded upon the common law. They still forget the distinction, that our constitution is in abridgment of the common law, and that it was intended to stand on its own feet independently of common law treasons. Let them only recollect this principle, and it will prevent them from a repetition of errors. There are no words in the constitution which warrant their arguments. Was it intended by it that *constructive* treason should exist in this country in any case? Was it intended that a person absent at a great distance (perhaps out of the country, in another and very remote part of the world) should be construed to be present here? that such a person should, under the constitution, be considered as guilty of treason here by acts done by others? Can there be a more unnatural and tortured construction than to suppose a person present committing acts of treason and violence in one state when he was peaceably and innocently occupied in another? Sir, constructive treason is abrogated by the constitution. It exists in no case in this country. We are not to consider men present when they are absent. Such a construction is as unjust and oppressive as it is unnatural and unessential to the purposes of justice. I shall produce no authority on this point, but shall proceed to the third point.

The presence of the party is necessary by the indictment. He is charged to have been present, and there should be proof that he was present. I have already supposed the present indictment was for a riot or unlawful assembly. Suppose it were for the latter, and suppose it were proved that Colonel Burr were absent from the unlawful assembly; there is no such thing as an accessory in a misdemeanor; would not this court say that he was excused from the act when absent? and shall *absence* be received to excuse an accessory in an unlawful assembly, and not be admitted in respect to treason when the accessorial agent is absent? The law will not presume *legal* presence. It is not allowed with respect to riots or unlawful assemblies. With respect to trials by the constitution, every crime is to be tried in the state and district where it is committed. If no treason have been

committed in Virginia, if it cannot be proved to have been committed there, this indictment cannot be supported. When we read in this indictment that the accused did, on the 10th of December, 1806, at Blannerhassett's Island, in the county of Wood, in this state, levy war against the United States; when we see it provided in the eighth amendment of the constitution, that "in all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial by an impartial jury *of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation*," &c., we know that no evidence other than of facts done in this district can be received in support of this indictment. It is in the indictment that the nature and cause of the accusation are to be set forth. It is in that manner he is to be informed of it. If acts were committed out of Virginia, they must be tried in the district where they were done. It is our duty to object to any evidence of transactions not stated in the indictment. The charge is, that he levied war on that island. The acts done and triable in this district cannot be tried in another, any more than facts committed in another district can be tried here.

It ought to have stated the name of at least one of the party, in order to connect the prisoner with some of them. To connect him with any one of them would suffice. The eighth amendment, just referred to, requires that the nature and cause of the accusation should be stated in the indictment. If a person absent may be charged for an act done in his absence, it must be done by a *special* indictment. The special connection between him and those who did the act should be particularly stated. If it be not stated, it cannot be proved. A special indictment must notify him that certain acts of strangers or persons unknown, or of certain individuals particularly named, if known, are intended to be brought home to him. It should state his connection with them, the acts performed by them by his advice or procurement, and his consequent responsibility for them. Thus he would have that information of the nature and cause of the accusation against him which the constitution requires to be given to every person accused of any crime. But as the indictment is

drawn, it should be proved, even according to the opinion of the Supreme Court, that Aaron Burr was on the island with the assemblage of people. An assemblage (which is admitted to be an indispensable ingredient in the offence) being proved in Wood County, without Burr being there, is not sufficient, because he is charged with being there, co-operating in the performance of the overt act of levying war. We consider this proof indispensable. From the charge, he is responsible only for acts done in Virginia. If legal constructive presence were intended to be relied on as proving that he was present on the island, it should have been so stated. The Supreme Court has nowhere said that a person may be indicted as present at the commission of the crime who was absent; nor has it said, that if it could be done at all, it could be admitted without a special indictment. The eighth amendment of the constitution precludes such a construction; he must be apprised of the nature of the accusation. This is a material information which cannot be dispensed with; and in the specification of their connection, all the links of that connection should be stated. Admitting, for the sake of argument, that an absentee may be charged and punished as if he were present at the overt act of war, yet his special connection as an accessory before the fact must be particularly stated. This is requisite on principle, and conformable to universal practice. Wherever a person is prosecuted for an accessorial act, it is the invariable practice to specify the nature and circumstances of that act in the indictment.

It is said that the principal in the second degree may waive the privilege of a previous conviction of the principal in the first degree. It is admitted that he *may* do so; but then the indictment should state specially the connection between him and the principal in the first degree. How could he, on a general indictment like this, make the objection till the evidence would be gone through? He could not suppose that under this indictment this species of testimony would be admitted to be produced against him. If the indictment were special, he would be previously informed of the nature of the evidence to be produced against him, and could deliberately determine whether to waive, or make the objection. Does not

this show you that the indictment ought to be special? Is it not the *universal practice*, in *civil* as well as *criminal* cases, that you *shall not produce proof of what is not alleged in the declaration or indictment?* This proves clearly that such testimony is not to be admitted. I understand Foster and Hale very differently from the attorney for the United States on this subject. If the indictment state circumstantially the connection between the principals in the first and second degree, the latter, being apprised of it, and of the nature of the testimony necessary to be produced against him, may waive the privilege of demanding the record of the conviction of the principal in the first degree, if he think proper; but this must be done *in form.* His waiver must be recorded, and then there is no inconvenience to the prisoner. A recurrence to Hale and Foster, as well as the reason and justice of the case, will evince the correctness of this observation. In 1 *Hale*, 623, already quoted, it is stated that the accessory shall not be put to plead till the principal appear; *nay, that "he shall not be constrained to answer to his indictment till the principal be tried;"* but that *if he will waive* that benefit, and put himself upon his trial before the principal be tried, he *may;* and that his acquittal or conviction will be valid on such trial. But he adds that "*it is necessary in such case to respite the judgment till the principal be convict and attaint;* for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment can be given against him." This special entry of the suspension or respite of the judgment (which would otherwise regularly follow the verdict immediately) until the principal shall be convicted and attaint shows that the connection between them must appear on the record, — that is, in the indictment; and that the waiver must also be recorded. The whole will then be plain and consistent; which would not be the case if the accessory or principal in the second degree were indicted generally as a principal in the first degree without any notice of any connection between them. As neither Colonel Tyler nor Mr. Blannerhassett nor any other particular individual is indicted with him, but he is indicted alone as an *actor* at the spot with divers unknown persons, how can the gentlemen, consistently with correct

principles, when he comes to trial, give evidence of their acts against him? How can gentlemen reconcile such an attempt to universal practice and the undeniable principle of the necessity of notice in the indictment of the intended charge, and of conformity between the charge and the testimony?

The indictment in the case of the prosecution for treason against Algernon Sidney, already referred to by Mr. Botts and other gentlemen, was very special; and there are many other instances like it among the records of public prosecutions. A *general* indictment is never used when the *case* itself is *special.* If ever there were a case in which the indictment ought to be special, it must be in a case like the present, where it is attempted, not only to punish a man for the acts of others, but to charge him as present on Blannerhassett's Island levying war in person when he was peaceably occupied in Kentucky, hundreds of miles distant. However it might be *in foro cœli* (if guilt existed at all), *in foro seculi* he could only be guilty in the second degree. The indictment against him is for levying war in this state and district. On his guilt there the issue is made up; and to the question whether he be guilty of levying war there or not, the evidence must be confined. The testimony of every person who is to prove facts at other times and places than those charged against him must be excluded as irrelevant. Whether the law will permit them to prosecute Colonel Burr for the acts of others, done in his absence, may become a question when they shall proceed regularly; but on this indictment, it is incontrovertible, that no evidence which does not prove his presence at the scene of action can be admitted.

I come now to the fourth point which I intended to establish. It is this: that the record of the conviction of the principal in the first degree must be produced before any parol evidence can be admitted against the accused, as it is impossible he can be more than a principal in the second degree.

If the gentlemen will give you the common law cases of accessories, I hope they will give you at the same time the rules of the common law on that subject. If they bring us under the principles of common law treason, let us have the benefit of its rules at the same time. If any

such rule as they contend for should ever be practised in this country, it will be in a more deplorable condition than ever any country was in before. By the common law, a person who does an accessorial act is called a principal in the second degree, and is equally a traitor with the actor or performer of the act of treason, who is called a principal in the first degree; but by the common law also, a principal in the second degree cannot be determined to be a traitor till there have been a conviction of the principal in the first degree, and a record of that conviction be produced. Leaving it to gentlemen to inquire metaphysically, and to try the strength of their distinguishing powers to ascertain the different grades of guilt in this crime, and the precise relation between the accused and those for whose acts he is attempted to be made responsible, I will ask, on what ground, with respect to this offence, was the prisoner present at Blannerhassett's Island when the overt act is alleged to have been committed? Is it not a case wherein he is a principal in the second degree, if at all liable? He is, from their statement, a principal in the second degree as to what happened on Blannerhassett's Island. What is the authority in Hale so frequently cited? That "*the accessory shall not be constrained to answer to his indictment till the principal be tried;*" and as the record of his conviction is the best proof of his being tried, he cannot be constrained even to answer to the indictment till a record of the conviction of the principal in the first degree be produced. It is indispensable, and must be produced before any other testimony. So that his guilt or innocence cannot even be inquired into till this record be produced. This serves also to explain that he cannot receive his right to demand this record but by a *formal entry* on the record after a special indictment has been exhibited. If the indictment be *special*, he cannot be compelled to answer till the record of conviction be produced; and assuredly he could not be deprived of this great benefit by exhibiting a *general*, instead of a *special*, indictment against him. After the record is produced, the guilt or innocence of the principal in the first degree is inquired into; for he has still a right to contest that he is guilty. The record, though evidence, is not conclusive against him. But who calls

this record evidence but this common law? The common law only makes it evidence. He is entitled to call for the record. If it be not produced, the cause is then stopped; and how stopped? By what authority is it stopped, but by the exercise of the power which belongs to your Honor? You have already declared that it belongs to the court to regulate the order of testimony; that this power is necessary to the due administration of justice. The law requires that the record of conviction should be produced in a case like the present; and if it be not produced, the court may, on our request, decide that the cause shall be stopped from proceeding further. Why should it be continued? The jury are to decide on facts, but not without evidence, or contrary to positive law. If this species of proof be indispensable, and cannot be obtained, the court has a right to stop the proceedings. Is a man to be convicted on incompetent testimony? If the law declare that no man shall be convicted of treason unless on the testimony of two witnesses to the same overt act, shall he be convicted on the evidence of one? Is it not the duty of the court to see the law duly administered? It has not the power of dispensing with the positive injunctions of the law, any more than a right to usurp authority. I have no doubt the court will, on the present occasion, do what is right. I hope that on all these grounds, unless the prisoner be proved to have been present at the commission of the acts charged in the indictment, and those acts were overt acts of war, the court will exclude the testimony which is to be brought forward as being irrelevant and inadmissible. I trust that if the court be satisfied with respect to the soundness of any one of the positions which I have laid down, it will not admit this illegal testimony; for if any one of them be correct, it is sufficient. If the acts done by those who were present be not, in a legal sense, acts of war — or if the personal presence of the prisoner were necessary either by the constitution or the form of the indictment, but cannot be proved — or if the record of the conviction of the actors be indispensable, but cannot be produced — the court will not receive the evidence.

The court then adjourned till to-morrow.

FRIDAY, AUGUST 28, 1807.

Mr. Martin addressed the court.

May it please your Honors:

I shall now endeavor to close the important debate before the court, and to show that our motion ought to be granted. It involves certain great principles, on the correct settlement of which greatly depend the welfare and happiness of the people of this country. I shall, therefore, make no apology for any length of time I may occupy in the discussion of the question. When we are defending the life of a human being, and discussing principles of such vast importance to the interests of the community and posterity, time ought not to be regarded. A sufficient period ought to be devoted to the complete investigation of the subject, and entire development of truth. We contend that there is nothing to support the indictment before the jury, even admitting all those things to be true (and considered them as proved) which gentlemen say their testimony could establish. We call on the court to decide on the relevancy of the evidence which they offer. It is the duty of the court to prevent the introduction of any evidence, in any case before it, which is irrelevant to the issue. For this objection to illegal testimony, which it was our indispensable duty to make, we have been denounced throughout the United States as attempting to suppress the truth and encroaching upon the exclusive rights of the jury. This subject shall be particularly discussed in the course of the argument. The exercise of this indisputable right has been held up to the public and to this jury as a conclusive proof of our guilt. It is alleged that we interrupt the due course of the testimony; that if we knew ourselves to be innocent, we would not have done so; and that it is sufficient to convince the jury of our criminality. We have been told that we are profoundly skilled in the science of defence, and are making the utmost efforts to save our client from merited punishment. Let us see what an immensity of time has been spent, and what means have been used in the course of this prosecution against our client, what patience and forbearanae he hath manifested,

and then let it be determined whether we ought to forego any legal advantages or surrender any of our rights.

The grand jury were sworn on the 22d of May, and we waited patiently from that day to the 13th day of June, before the *primum mobile*, General Wilkinson, thought proper to appear in obedience to the process of the court; by which means our client has suffered much inconvenience, and a great number of witnesses have suffered still more inconvenience. From the time that the indictment was found to be a true bill, our client has been closely confined. The first panel did not contain a sufficient number of unexceptionable jurors. Only four of them could be admitted, and these were not sworn till the 10th of August. Another panel was to be summoned, out of which the rest of the jury were not selected and sworn till the 17th of August, although Colonel Burr did everything that he possibly could to expedite the trial, waiving considerable privileges, as the history of the proceedings thereon will show.

It may be said that he objected to a jury being sworn from the first panel, and therefore retarded the proceedings; but surely, sir, no person will consider it as a crime that he did not consent to be sacrificed, or, what is the same thing, that gentlemen who had signed his doom in their own minds beforehand should decide on his reputation and his life.

When this motion was made, though so much time had elapsed, only twelve witnesses had been sworn out of about one hundred and forty on their side; and there are thirty or more to be examined on our side; it is not therefore unreasonable to suppose, that to examine all the witnesses, and hear the whole testimony, irrelevant as well as relevant, would require a month, perhaps two months. And further, when the circumstance of this season of the year is considered, the admission of illegal testimony, and waste of time in its examination, became more improper. Jurymen cannot be certain of retaining their health. Is it not probable that before the trial would be brought to a close, some of the jury, from the confinement which they must endure, might be taken sick? What would be the result? Our situation, already unpleasant and distressing, would become much more so.

The jury must be discharged, and the whole must be done anew; or if, by consent, a juror were to be substituted in the place of a juror taken sick, the whole testimony must be re-examined, and the same length of time consumed; and, if so, the same cause might again produce the same effect; so that from the infirmity of witnesses produced on the present occasion, there is scarcely a probability of the cause being determined in any reasonable period. During all this time Colonel Burr must remain in confinement; and yet this time would be totally useless to him. While it oppressed him, it would afford him no benefit.

These considerations must satisfy every person who is in court that our conduct is justifiable in resisting all attempts to introduce illegal testimony, and preventing the time of the court from being wasted in improper and irrelevant discussion, and that we do not wish to evade justice. I was myself disposed to waive these obvious and undeniable rights, and to submit to the inconveniences of hearing all the evidence, however irrelevant, because I was convinced that it would remove all the prejudices which have been excited against Colonel Burr, without having the least foundation, and demonstrate his innocence to be as pure as that of the unsullied snow. But on consultation with the able gentlemen associated with me, this course has been deemed more eligible on principles of law as well as convenience. That the artifices and persecution of his enemies should have so far succeeded, as to place Colonel Burr in his present situation, is a matter of deep regret; but I shall ever feel the sincerest gratitude to Heaven that my life has been preserved to this time, and that I am enabled to appear before this court in his defence; and if the efforts of those highly respectable and eminent gentlemen, with whom I have the honor to be associated, may, united with my feeble aid, be successful in rescuing a gentleman, for whom I with pleasure avow my friendship and esteem, from the fangs of his persecutors — if our joint efforts shall be successful in wiping away the tears of filial piety, in healing the deep wounds inflicted on the breast of the child by the envenomed shafts of hatred and malice hurled at the heart of the father — if our efforts shall

succeed in preserving youth, innocence, elegance, and merit from a life of unutterable misery, from despair, from distraction, it will be to me the greatest pleasure. What dear delight will my heart enjoy! How ineffable, how supreme will be my bliss!

Nor is private friendship for the accused and his connections my only inducement to use my utmost efforts in his vindication. I am urged by a different, but very powerful motive. I am thankful to Heaven that when a great question, so awfully important as that which respects the principles of treason, is to be decided — a question on the correct construction of which the happiness or misery of the present and future ages depends — it gives me infinite pleasure to have an opportunity of exerting to the utmost my feeble talents in opposing principles which I consider so destructive as those which are advanced on the present occasion; and if we shall demonstrate contrary principles to be correct and proper, if we shall be able to satisfy the court that principles the reverse of those contended for on the part of the prosecution ought to be established, I shall think that I have not lived in vain.

Before I enter into a particular discussion of the question of law before the court, I must make some observations in answer to some remarks made by the gentleman who first spoke for the prosecution on the present question. He disavowed every intention of using declamation, but charged it upon us, and justified the necessity of resorting to it by our conduct. Yet his speech consisted principally of declamation. Three times has he declared that he was under the painful necessity of speaking of Colonel Burr's guilt. One half of his speech consisted of declarations holding up to this court that he was guilty; and the other half was composed of eulogies on General Wilkinson. He then accused us of having attacked General Wilkinson and Major Perkins; and this furnished him with a pretext of passing a eulogium on Major Perkins. Whoever is connected with the accused is the subject of rancorous abuse; and whoever is opposed to him is incessantly and warmly eulogized.

He then went into what he ought not: indirect charges that we had prevented some of their witnesses from being here. If he did not mean anything of this kind, he must

be candid enough to say that there was no necessity of taking up the time of the court in adverting to the circumstances at all. If one of their witnesses got drunk, uttered improper expressions, and was obliged to leave the place without appearing to give his evidence, are we to be blamed for his misconduct or flight? Did Colonel Burr or any of his friends make him drunk, or lead him to use those imprudent expressions, to raise an insurrection of the most horrible kind, and to draw the daggers of our slaves against their masters? If no imputation were meant, why was the circumstance mentioned at all? Did we induce his departure? It is not a little unfortunate for the government, that among the witnesses whom they have procured there must be such infernal villains as this man appears to be.

Another charge against us was, that we had endeavored to commit another of their witnesses. And suppose we had succeeded; would that have prevented them from getting the benefit of his testimony? No, sir, it would have put him in a place of safety, where his body would be within their reach; and he could give his evidence at any time. Why, then, was it proclaimed to the public that there could be no doubt of the guilt of the accused? Why was a word said of the evidence of General Eaton, or of Commodore Truxtun, or of the Morgans? Did their evidence authorize such a declaration? We say that he is not guilty; and gentlemen ought to remember that their testimony may (and certainly will) be contradicted by the evidence of Colonel Burr. Why does the gentleman oppose the motion so strenuously if the merits of the question in any shape depend on the guilt or innocence of Colonel Burr? Does the law depend on the guilt or innocence of the party accused? It depends on the facts proved or stated to the court without the least regard to the party interested, or his innocence or guilt. I will now return to the question of law. There are before the court, for its decision, four points, into which the argument has branched out. There is no other, unless they have some further testimony to prove that Burr was on Blannerhassett's Island when the pretended overt act was committed. If they have such testimony, we are willing to hear it, and invite them to produce it. But

supposing that they have not (and the gentleman who prosecutes does not expect to prove that Colonel Burr was on the island; for he says that his own opinion is that he was not there); the four points are: First, admitting the evidence to be true, and that the facts sworn to have been done on the island were really committed there, yet they do not constitute an overt act of levying war, however treasonable the intentions of those who composed the assemblage, without force, and however great their number may have been.

Second. That no accessorial agent in levying of war can be convicted before the principal actor is convicted, and a record of the conviction produced against him.

Third. That no evidence of accessorial agency can be received in support of an indictment charging the party accused as a principal, or as having levied war generally.

Fourth. That under the constitution, no person that would, according to the common law, be an accessorial agent, can be guilty of treason in the United States. Here I will observe, by way of preliminary remark, that there is no sort of question but the principal and accessory may be brought to trial together (or at the same time), if both be before the court, and the accessory waive all objections to a trial; but if he do not waive it, the antecedent conviction of the principal must be produced; and if he waive it, the court will direct the jury to acquit him, if the guilt of the principal be not proved. Here, sir, I would beg to be understood that neither Colonel Burr nor his counsel admit or suggest that Blannerhassett or any other person was guilty of treason on Blannerhassett's Island. It is only a suspicion. We have not the most distant idea that he was guilty. Where, then, was the propriety of saying that we are willing to sacrifice Blannerhassett? and that he might be hanged without pity or remorse on our part? We deny it. We disavow and execrate such sentiments. We hold up to the public our sacred belief that Blannerhassett is as innocent as I am, or as the gentlemen on the other side; that no man on the island was guilty of treason; and that the party who were there were engaged in honest and honorable pursuits, without any other motive whatever. If even the *intention* to make war had been proved, yet

throughout the whole Union, the *violence of actual war* has never been known to take place. If such a war have taken place, it was a mighty strange kind of war, which neither man, woman, nor child has ever seen or heard. Though there was a great war in the United States from New Hampshire to New Orleans, and a great number of persons were engaged in it, yet in this great war not a single act of violence can be proved by any human being to have happened.

Having cleared ourselves of the imputation of being willing to sacrifice others to clear ourselves, or admitting that others are guilty, I will now proceed to examine the subject, supposing that treason has been committed. I will first investigate who are accessories in murder and felony before and after the fact, and then apply the result to the doctrine of treason; in which the law declares persons to be principals who in those cases are accessorial agents. In order to understand the doctrine correctly, it is necessary to have a clear and distinct idea in what instances persons concerned in murder and felony can be considered as principals, and in what as accessories. Wherever a person who has a share in the commission of the crime can be considered as being present, though not heard or seen, he is a principal. If he can be considered by law as constructively present, accessorial agency does not apply to him; but he must be considered as an immediate actor, and so indicted. This distinction will be manifest by reading 2 *Hawk. P. C.* 445, chap. 29, sec. 16, in the words following: "As to the second point, viz.: In what case a man shall be adjudged an accessory before, it seems to be agreed that those who by hire, counsel, or conspiracy — and it seems to be generally holden that those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it (but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them), are all of them accessories before the fact, both as to the felony intended, and to all other felonies which shall happen, in and by the execution of it, if they do not expressly retract and countermand their encouragement, before it is actually com-

mitted." In page 448, in the 26th section of the same chapter, he defines who are accessories after the fact, in the words following: "As to the first particular, what kind of receipt of a felon will make the receiver an accessory after the fact, it seems agreed that generally any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape, or where one harbors and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbors in his house and openly protects such a felon, by reason whereof the pursuers dare not take him." In pages 439, 440, and second section of the same chapter (which see quoted in the first volume), he states in what offences there can be no accessories, but all must be principals if any way guilty; which are treason and trespass. But in the note subjoined by his editor, the distinction between an accessorial and principal traitor is explained, and the necessity and propriety of convicting the latter before the former pointed out. 1 *Hale*, 435, shows that generally he who commands, counsels, or abets another to commit, if he be absent, is only an accessory before the fact, though he is in justice equally guilty with the actor. But in the case of poisoning, though he that counsels another to give poison, if it be given, if absent, is but an accessory, yet he that lays the poison to the intent to poison, though he is absent when it is taken by the party, is principal. But a distinction has been attempted to be drawn by the counsel for the prosecution between those accessories who command or procure treason to be committed, and those who are guilty of comforting or receiving traitors. Whatever doubts might once have existed in the books, they have long since ceased to make any distinction between traitors who commit and those who advise treason, or comfort traitors, as to the grade of the offence and the degree of punishment.

The gentlemen have correctly stated the law: that a person, though not actually within sight or hearing of

where the crime was committed, yet if he belong to the party, he must be considered as a principal; that though at a distance, he is legally present. The distinction between legal and actual presence is well known; yet it is erroneously applied to the case before the court, on the record. If they wished to establish the principle of their arguments on the subject of legal or constructive presence, and transfer it to Colonel Burr, they should have shown in their indictment that he was at the distance of one or two hundred miles from the scene of action, yet that by legal construction he is to be considered as being at Blannerhassett's Island.

But if the indictment had been thus special, though it would have given him notice of the charge, the doctrine of *constructive legal* presence would not sanction it. That doctrine has never been extended so far. It is fully detailed in 1 *Hale, P. C.*, 439. The several cases there mentioned have been already quoted. The first case is, "If divers persons come to make an affray, &c., and are of the same party and come into the same house, but are in several rooms of the same house, and one be killed in one of the rooms, those that are of that party, and that come for that purpose, though in other rooms of the house, shall be said to be present." Here all were considered as present, because all went into the house (though not in the same room) with a view to kill him; and all were ready to make immediate resistance; and the person who perpetrated the fact was encouraged by their being so near and ready to assist him. But the constructive presence is extended, beyond the actual presence, only the distance from one room to another of the same house.

The next case is that of the Lord Dacre and others, who came to steal deer in the park of one Pelham: one of them killed the keeper in the park; the Lord Dacre and the rest of the company being in other parts of the park. It was ruled to be murder in them all. They went combined together to resist by violence any opposition to them. Some were in one part of the park, and some in another. He was killed in one part of the park; and it was determined to be the act of all of them. Why? Because they all went together; and all combined to

defend themselves and encourage one another. They were near enough to the perpetrator of the crime to encourage him to take the life of the keeper, and to give him immediate assistance. The person who was determined to have committed the murder was within *call* of the others, or nearly so. They were not more than a quarter of a mile distant.

"The like in case of burglary: though some stood at the lane's end or field-gate to watch if any came to disturb them, yet they are said to be burglars, because present aiding and assisting to the burglary." They are deemed equally guilty, because they combine together to commit burglary. They have all one common object in view; and those who do not commit the immediate act of burglary are at a proper distance to give aid and assistance to the actors, to prevent other persons from interrupting them, and to give them immediate information of any persons coming against them.

The subject is further illustrated by another authority in page 443, where he discusses the doctrine: that if many come to commit an unlawful act, and if in the pursuit of that act one of them commit murder or manslaughter, they are all guilty that are of that party that committed the disorder. But he adds that it must be a killing in pursuit of that unlawful act, that they were all engaged in. As in the case of the Lord Dacre: they all come with an intent to steal the deer; and consequently the law presumes they come all with intent to oppose all that should hinder them in that design; and consequently when one killed the keeper, it is presumed to be the act of all, because pursuant to that intent. The reason of their being all involved in equal guilt is, that they all went together on one common object, and meant to oppose all who should endeavor to prevent them; and the act being done in one part of the park, is considered the act of all.

In page 537, the doctrine is thus further stated: "It has been before observed, that upon the statute of 39 *Elizabeth*, cap. 15, though A and B be both present, and consenting to the breaking in and entering of a house to rob, and A only enters into the house, and B stands by, A shall be ousted of his clergy, but B shall have his

clergy, because A only entered the house; and the words of this statute extend only to him that actually enters the house; yet if A and B be present, and consenting to a robbery in or near the highway, or to a burglary, though A only acually commits the robbery, or actually breaks and enters the house, and B perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers and burglars; and both shall be ousted of their clergy, as in Pudsey's case; and the reason of the difference is, because, in this case, both are robbers and burglars; but in the former case, both steal not in the house, but only A; and that statute binds up the exclusion of the clergy to stealing in the house." [Here he read the next paragraph, which see before.]

We shall see what was Pudsey's case, in *Hale*, 534, and how far it comes within the general principles of the cases of constructive presence, as stated in *Foster*, 349: "Pudsey and A and B assault C to rob him in the highway; but C escapes by flight; and as they were assaulting him, A rides from Pudsey and B and assaults D out of the view of Pudsey and B, and takes from him a dagger by robbery, and came back to Pudsey and B; and for this Pudsey was indicted and convicted of robbery, though he assented not to the robbery of D, neither was it done in his view, because they were all three assembled to commit a robbery; and this taking of the dagger was in the mean time." See also 1 *Anderson*, 116. The offence committed here was far out of the sight and hearing of Pudsey; but he was held to be present, because at the instant when the fact was committed, he was of the same party and upon the same pursuit with A and B, and under the same engagement and expectation of mutual defence and support with A, who actually committed the robbery. They were all together when they attempted to rob C; and though A went one way and Pudsey and B another, yet he came back to them. They assembled in order to rob; and they were still of the same party, and pledged to mutual defence and support, and were nearly within call of one another. The act of robbery was therefore the act of Pudsey as well as of A.

The case of Lord Dacre, mentioned in 1 *Hale*, 439,

who refers to *Moor*, 86, is the same in principle. Let us not solely rely on the positions of elementary writers, but resort to the report itself, and see how the case stands. The Lord Dacre and others went together for the illegal purpose of robbing the park, and to overcome every resistance made to defeat their attempt. The keeper demanded of Royden, one of the company, what he was doing there; and he killed the keeper. Lord Dacre and the rest were half a mile off, in other parts of the park; but because they went for the purpose of committing an illegal act, with the avowed determination of defeating all opposition, they were all deemed to be constructively present and equally guilty. A person is legally present if he be near enough to aid in the defence of the actor if he should be attacked. It is sufficient if he be present in such a manner as to be known by the person committing the act, to be ready to aid him. If he be near enough and ready to assist him on the spot, he is legally present.

Foster, 349, 350, was commented on by the gentleman. The general expressions here used are to be explained by the cases to which they refer: "When the law requireth the presence of the accomplice, at the perpetration of the fact, in order to render him a principal, it doth not require a strict, actual immediate presence, such as would make him an eye or ear witness of what passeth." Will gentlemen apply this doctrine to the case at bar? Is there any similitude in situation or principle? How different from the situation of Colonel Burr was that of Pudsey or Lord Dacre? Was Colonel Burr on Blannerhassett's Island? or in such a situation as to be ready to give immediate assistance to those persons who were on the spot? or within a little distance, to give them assistance in making or repelling an attack, or to prevent surprise? Was he in a situation to give them aid at the very time and on the very occasion when the overt act is alleged to have been committed? Can he be said, on any rational principle, to have been constructively present? "Wherever several persons set out together, or in small parties, upon one common and unlawful design, on the principle of mutual concert, aid, and protection, they are all considered as one party present where the felony is committed, and equally guilty.

Cases are put by *Foster* himself to illustrate the general principle in page 353 : "Three soldiers went together to rob an orchard ; two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand. The owner's son, coming by, collared the man at the gate, and asked him what business he had there ; and thereupon the soldier stabbed him. It was ruled by Holt to be murder in him, but that those on the tree were innocent. They came to commit a small, inconsiderable trespass ; and the man was killed upon a sudden affray without their knowledge. It would, said he, have been otherwise if they had all come together, with a general resolution against all opposers ; for that circumstance would have shown that the murder was committed in the prosecution of their original purpose ; but that not being the case, those on the tree were considered as mere trespassers ; and their offence could not be connected with that of him who committed the murder."

This is a distinct case from the others. It is true that they all went together, each to act the part assigned to him. They were all on the spot to assist one another, to give notice to prevent surprise, or to favor their escape. It was certainly a common cause with them : each acted in his station at the same instant towards the same common end ; and the part each took tended to encourage and protect the rest ; but as the persons on the tree were not actually present, but at a distance, as they only intended to commit a trivial trespass, and the act was committed without their knowledge, they were deemed innocent ; but the author states that it would have been otherwise, if those two had come to a determination to kill any person who should oppose them.

Hawkins, in his 2d vol., chap. 29, sect. 8, p. 442, explains very clearly this principle of constructive presence : that it is sufficient to constitute this legal presence that the actor has hopes of immediate assistance ; that the law considers, as actually present and as actors, any persons who, being of the same party, though not on the spot, are in such a situation that the real actor has hopes of immediate assistance from them. It is in consequence of this immediate assistance that he is emboldened to commit the act of criminality. His words are, "But it

seems to be sufficient for this purpose that the person who does the fact is encouraged and emboldened in it, *from the hopes of present* and *immediate assistance from the abettor*, whether he be within view of the fact or not. And upon this ground it has been adjudged that where persons combined together to stand by one another in the breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals, though at the time of the fact some of them were at such a distance as to be out of view."

On the present occasion, the counsel have endeavored to distinguish between cases of constructive presence in treason and other crimes. They insist that to determine the degree of proximity between the immediate actor and his aiders or abettors, who are legally construed to be present, you must consider the theatre of action, and extend the degree of proximity, according to the extent of that theatre; that the *legal presence*, which would not exist in murder or felony, may well exist in treason; that in treason all the whole United States are the theatre of action; the scale of proximity essential to *legal* presence, should be in proportion; so that persons in Tennessee or Kentucky are to be considered as legally present on Blannerhassett's Island when the acts in question were committed. It is evident that the principles of legal constructive presence cannot be extended to this case; for the *actors* could have no hopes of immediate assistance from the others, who were hundreds of miles distant. But they insist that treason consists in the treasonable intention. It has been echoed and re-echoed that treason consists in the treasonable intention. We admit that there is in Great Britain one species of treason which consists in the intention, without any act consummating the guilt of treason. I mean the compassing the death of the king, where the crime is merely imagined; and nothing more is necessary than to write a letter to a man, advising him to kill the king; and that fact being proved, he is guilty and liable to be punished for treason, though the king was not killed, and though the party advised took no steps to pursue it. Though this be correct when confined to the death of the king, queen, or eldest

son of the king, and the treasonable intention constitutes the treason, yet the overt act is evidence of the intention only, and not of the actual commission of the crime ; because writing a letter is not treason, but proof of the intention to commit it. But why is the intention to commit it treason in Great Britain ? Because a special law is made for the safeguard of the life of the king, making it treason to conspire, compass, or imagine his death, when evidenced by some overt act such as I have just stated ; a conspiracy against the life of the king, whether carried into execution or not, is made treason by a special act of Parliament. But in America we have no species of treason except two : levying war against the United States, and adhering to their enemies, giving them aid and comfort. What is the treason charged on us ? Levying war. This overt act of levying war, which is said to have been committed, must be proved by two witnesses. According to the constitution, no person can be convicted *unless on the testimony of two witnesses to the same overt act.* If there be twenty overt acts, and each of them proved by one witness, nay, if there be fifty overt acts committed at different places, and each proved only by one witness, it will not suffice ; two witnesses must concur in proving the same act at some particular place, or the accused cannot be convicted. The *overt act* of levying war is not the crime of levying war, which consists of intention and act together. But gentlemen must admit that the intention alone is not punishable. There must be an actual levying of war ; and the overt act is proof of it. On an indictment for levying war, they can give no evidence but of what is charged. They can adduce proof only of the overt act which they have laid. Proof of the intention alone would be inadmissible ; just as in the case of murder, the prosecutor cannot prove the murder without proving that the party has been killed ; and so in a prosecution for stealing a horse, the taking of the horse must be proved ; the malicious intention to kill in the one case, and the felonious intended appropriation in the other, must be established ; but the intention in either case will not do without the act. Let us pursue the analogy. The treason, say they, is in the treasonable intention : well, what is this treason ? Levying war. This, it is con-

tended, consists in the treasonable intention; that is, in other words, *intending to levy war is levying war.* But a treasonable intention merely is not treason; nor does intention, however criminal, constitute in this country any crime whatever. It would reduce it to this: that a treasonable intention would of itself alone be a levying of war; that the treason of levying war consists in the intention of levying it, and is the same in principle as that murder consists in an intention to kill, that stealing a horse consists in the intention of appropriating the horse to his own use, and any other crime consists only in the intention to commit it. This gives us some standard to show that the fact of levying war must be proved, and it must be proved that those acts on the island were done to subvert the government of the United States.

Mr. Wirt disavowed the idea that a treasonable intention constituted the consummation of treason, and insisted that no such doctrine had been advanced; that treason consisted, like other crimes, of intention and act; that the moral turpitude of the guilt lies in the intention, which is often to be inferred from the nature of the act itself; but that it never was denied by them that intention and action must combine to establish the guilt.

Mr. Martin. — The gentleman cannot make the case better. The act of treason (though the whole United States be the theatre for its commission) is confined to the spot where the overt act is committed, in the manner that murder is to the spot where a man is slain. To show that the overt act, in order to constitute treason, must be committed with a design to subvert the government of the United States, that war must be actually levied with that intent, and that no acts of violence, by any assemblage however numerous, can be treasonable, unless committed for the purpose of destroying the government, I will read 1 *Hale*, 149, 150. After stating that the overt act must be specially laid in the indictment, and proved upon the trial, he proceeds to state "that a levying of war, with all the circumstances imaginable to give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatorum, et modo guerrino arraiat*, yet if it be upon a mere private quarrel between private, though great, persons, or to throw down the enclosures of such a manor

or park, where the party, though without title, claims a common, or upon a dispute concerning the propriety of liberties or franchises, this, though it be in the manner of it a levying of war, yet it is not a levying of war against the king, though bloodshed or burning of houses ensue in that attempt, but is a great riot for which the offenders ought to be fined and imprisoned; and if any be killed by the rioters in the riot, it may be murder in the assailant. . . . An actual levying of war, therefore, against the king, to make a treason for which the offender may be indicted upon this clause of the statute for levying war against the king, consists of two principal parts or ingredients, viz.: 1. It must be a levying of war; 2. It must be a levying of war against the king. . . . What shall be said a levying of war is partly a question of fact; for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war (for then every riot would be treason, and all the acts against riotous and unlawful assemblies had been vain and needless); but it must be such an assembly as carries with it *speciem belli;* as if they ride or march *vexillis explicatis;* or if they formed into companies, or furnished with military officers; or if they are armed with military weapons, as swords, guns, balls, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war; which circumstances are so various that it is hard to define them all particularly." According to the authority of the English books, then, a large assemblage of men committing great acts of violence do not constitute treason unless their intention in committing them be to destroy the government. You must examine into the intention which influences the persons who do these *acts* before you can determine them to be treasonable. This shows conclusively that an assemblage of men, even armed in military array, are not to be considered as treasonable unless their intention be proved to be treasonable; that is (applying the doctrine to this country), unless the intention be to subvert the government of the United States.

Sir, I execrate a contrary doctrine as highly tyrannical and oppressive; and here I beg leave to enter my censure

against the decisions of the court in Pennsylvania on this subject, in the cases of what were called the whiskey and hot water insurrections. Some of those engaged in them were decided, in my opinion improperly, to be guilty of treason, according to the constitution of the United States. I shall not fully examine this subject at present; but I think it my duty to enter my solemn protest against the decision of the court in those cases, though made by gentlemen of learning and integrity; and if ever the question should come before the Supreme Court, I will endeavor to show that those decisions were illegal and improper. In these cases there was no design to subvert the government. Such a thought was not entertained. It was the expression of their disapprobation of a particular law, and an opposition to the execution of that unpopular law; and the intentions of those people went no further than to induce its repeal. But according to the authority already referred to, though war was levied with all the usual solemnities of actual war, though violent acts were committed, and a number of people killed, yet the parties engaged in it would be only guilty of a great riot, or, at most, of murder, but not of treason, on this principle that their intention was not treasonable, that the subversion of the government never was in their contemplation.

The present indictment fixes the locality on Blannerhassett's Island (and let it be remembered that treason consists in the act of levying war, done with a treasonable intention); and the charge confines the imputed act to that particular spot. The idea of the treasonable design pervading the United States, like pestilence in the air, from one part of the country to the other, and giving it ubiquity, here, there, and everywhere, from New Hampshire to New Orleans, being present everywhere, like the Deity, and destroying thousands wherever it goes, is no less dangerous than it is unfounded and preposterous. Let me be fully understood. I mean to deny explicitly the doctrine of constructive presence in the extent for which gentlemen contend, and this legal ubiquity by which a man may be said, by the instrumentality of his agents, to be present in any and every part of the United States — this ubiquity which they give us of being here,

there, and everywhere. In order that my argument may be clearly comprehended, I pray your honor that I may have permission to examine and show how far the adjudications on treason in Great Britain can influence the decisions on the same subject in America.

It has been repeatedly declared in our courts that the decisions in Great Britain, however entitled to respect, are not binding authority in this country; and I thank God that this is the case. The principles laid down in Great Britain respecting treason, as appears from the history of their jurisprudence, have been such that their judges have, in the most arbitrary manner, carried into execution the most wicked wishes of the persons who held the crown. Even after the revolution of the year 1688, this has been the case, though not so much as formerly; they have extended the rules of evidence, with respect to treason, so as to shock humane judges. It is not contended but what the judges since the revolution have discovered sufficient inclination to extend and carry into rigid execution the law of treason, or the statute of William III. would not have been enacted. Since then, they have shown a disposition to extend the law and construction of treason, and make a person guilty of it who only opposed the measures of the government, especially in cases of compassing the death of the king. The influence of the crown was such, that whatever endangered the life of their sovereign lord and master, from whom the judges derived their authority, was construed to be treason in imagining or compassing his death. As they were under this bias, their decisions ought not to be considered as binding precedents, but received with great caution. It is indeed necessary, for the clear investigation of this matter, that mere general expressions relating to the crime of treason in Great Britain ought not to be construed as extending to treason in levying war, but to the other branch, the doctrines of which were adopted to guard the life of the sovereign.

But an overt act must be set forth in every indictment for treason. In 1 *Hawk. P. C.*, chap. xvii., sec. 3, the words of the statute 25 Edw. III., reciting the different kinds of treason to be from that time in force in that country (without a legislative declaration of other treasons), are quoted.

These treasons consist, first, in compassing or imagining the death of the king, queen, their eldest son and heir, or violating the king's companion, or his eldest daughter unmarried, or the wife of his eldest son and heir; second, in levying war against him in his realm; or, third, in adhering to his enemies, giving them aid and comfort, in the realm or elsewhere; and concludes with these words: "*and thereof be provably attainted of open deed by the people of their condition.*" In the twenty-ninth section of the same chapter, these words are explained thus: "As to the branch relating to an overt act, I shall take it for granted that some overt act must be alleged in every indictment of high treason, in compassing the death of the king, &c., or levying war, or adhering to the king's enemies." This overt act must be laid and proved in every instance. In the case of compassing the death, &c., the object of requiring it is to prove the intention. If the intention could be otherwise proved, whether any act were done or not, though the person of the king were never injured, yet the party would suffer death for it, because in that case the crime consists in the design formed in the mind.

But in all other cases, the person is not punishable unless his intention be carried into effect. As in the case of a charge for violating the queen or any other of the king's family, however a man may have conspired for that purpose, he is not guilty unless he have actually violated the queen, &c., any more than he would be guilty if he only intended to violate the wife of any other man, or a lady of any other family. So on an indictment for levying war, it must be proved that war was actually levied. An intention or a conspiracy to levy war is not treason unless the war actually take place. Is a design to levy war and making war the same thing? Sir, no conspiracy, no intention, no combination with a view to levy war, no preparation to levy war, unless the war be levied, constitute treason. Some *act* must be *committed.* It is a special act of Parliament which makes a mere conspiracy against the life of the king treason. *Hawkins*, in the eighth section of the same chapter, observes, with respect to the words "compass or imagine the king's death," that "since the said statute, these words have been so strictly followed

that where a king hath been actually murdered, yet not the killing him, but the compassing his death has in the indictment been laid as the treason, and the killing as an overt act thereof." And therefore when they punished the regicides, the indictments charged that they did traitorously compass and imagine the death of the king; and the taking off his head was laid, among other acts, as an overt act of compassing; the crime being still considered as the act or resolution of the mind, as there could be no cutting the king's head off, if there were not an intention to kill him. Under the temporary act of Parliament by which a conspiracy was made treason, conspiring to make war was a treasonable act; and any consultation to levy war would be proof of the guilt of the person accused, as it would be, of compassing the death of the king. Enlisting soldiers would be proof of a conspiracy to levy war, but not of war having been actually levied. No act of treason in aiding and assisting the king's enemies, no intention to aid and assist, no preparation for that purpose, unless carried into execution, would be an act of levying war, though they might be of adhering to the king's enemies. Writing a letter, giving information, accepting a commission, sending arms, ammunition, or provisions, are all acts of aiding and assisting, and would support a charge of adhering to the king's enemies; but not one of these would be an act of levying war.

I will now trouble the court with showing what are overt acts of that species of high treason which consists in the intention (though no act be committed) according to the nature of the evidence. *Foster*, 194, concurs with the authority of Hawkins, just referred to, that in every indictment for this species of treason, and indeed for levying war, or adhering to the king's enemies, an overt act must be alleged and proved. And *Hawkins*, sec. 30, says that "conspiring the king's death, and providing weapons to effect it, or sending letters to incite others to procure it, or actually assembling people in order to take him into their power, and all other such like notorious facts, done in pursuance of a treasonable purpose against the king's person, may be alleged as overt acts to prove the conspiring his death."

Levying war itself may be laid as an overt act of com-

passing the king's death; and when it is so laid, the accused need not be charged with anything more. When the indictment is for levying war as a specific treason, it must specify the overt act which is to support it. So says the act of Parliament. So say all the authorities; and especially the cases of the rebels who were taken in Carlisle, and Sir John Wedderbourn's case, who was proved to have been with them at Aberdeen, and Deacon's case, — all reported by Foster.

This doctrine is fully confirmed in the case of The King *v.* Captain Vaughan (reported in 5 *State Trials*, 17), who went on board a vessel called the Loyal Clencartie, in the service of the French king, to cruise against the subjects of England. In that case there were two counts in the indictment — one for levying war, and the other for adhering to the king's enemies. It was decided, on argument, that his cruising in this vessel, though he fought no battle, and committed no actual hostility, was an act of aiding, and supported the count for adhering to the king's enemies; but it was decided and admitted that it was not sufficient proof to support the other count, for levying war, and "*that there must be an actual war proved upon a person indicted for levying war.*"

When the specific act of treason of levying war is charged against any person, the act of Parliament expressly states that an overt act of that treason must be laid; and as it must be laid, so it must be proved. In 2 *Ventris's Reports*, 316 (an authority which is regarded as respectable), in the case of The King *v.* Patrick Harding (who was indicted of treason in the time of William and Mary, for enlisting sixteen men, and sending them to France to aid the king of that country against the English), it was decided that he was guilty of treason, but not of the treason of levying war. The specific treason whereof he was guilty was not that of levying war, but adhering to the king's enemies. The indictment charged that he compassed the death of the king and queen, and levied war against them, in enlisting those men, and sending them out of the country to join their enemies. It was determined that he was guilty of high treason within the clause of the statute for compassing the death of the king, it being found by the special verdict that the pris-

oner did enlist those men with an intent to depose the king and queen, &c. It appears to have been an almost universal practice in former times, in prosecutions carried on by the attorney general, to state in every indictment a charge for compassing the death of the king, and for the plainest reason in the world: that this kind of indictment comprehended every kind of treason, and facilitated the conviction of those marked out for destruction. It was a comprehensive mode of prosecution which was more easy to be conducted, and more successful in accomplishing the end proposed. If a person were to be indicted for aiding and assisting the king's enemies, or levying war against him, they would state in the indictment a charge for compassing the death of the king, because, according to the system adopted, this charge could be more easily supported by proof. Those who wished to destroy innocence preferred this mode of prosecution, because it would put the person accused more at their mercy. For in cases of compassing the king's death, the most wicked and arbitrary prosecutions were countenanced by the courts of justice. When the safety of the person of their king was in question, principles the most incompatible with justice were sanctioned. For this purpose, in every prosecution when specific facts were proved, they would go into a history of the conspiracy against the king; because every conspiracy against the prince or his government was construed to be a plot intended against his life. And in the examination of these conspiracies, in order to establish their existence, they went into every kind of evidence — letters and verbal declarations and words uttered by others, though not in the presence or hearing of the person accused; letters written, not to him, but to any other person; and papers found in his possession. All these were jumbled together to establish the conspiracy and the connection of the persons accused with it. To establish those conspiracies and the connection of those who were accused of being concerned in them, every species of illegal and improper evidence was admitted by the most corrupt judges that ever sat in a court of justice. Not acts alone, but mere loose words, a hasty declaration, an assent inferred from an unguarded expression, nay, the declarations of other people, and pa-

pers found in the possession of the party, by whomsoever written, were all admitted against the accused as proofs of a conspiracy, and of compassing the death of the king. Transactions in themselves innocent were deemed sufficient to condemn to the scaffold. A mere declaration was sufficient to prove any act required to be established; because the death of the king was the cause of prosecution. An open, notorious act was not deemed necessary to establish guilt, but a story, a mere verbal assertion, without any positive proof of any real fact. This kind of evidence was admitted because it was the best calculated to destroy the victim of the government or of private revenge.

They have on the present occasion proceeded on the principle that they could prove a conspiracy; but is there a particle of criminality proved? If some sort of connection between the person accused and those joined in the supposed conspiracy be proved, this is by no means sufficient on this indictment for levying war; but they must prove war actually levied, an act done. No person can be guilty of treason, though a thousand conspiracies to levy war were proved, without the existence of actual war. There must be an actual war proved. That is the proof which is introduced in all other cases except compassing the death of the king.

If two or more engage in a robbery or burglary, no declaration made by one of them can be admitted in evidence against the other, unless he were present, and assented to it; and no act of the one can be proved against the other, unless he were present, aiding, assisting, and giving his approbation of it. That the law most certainly required two witnesses to the same overt act of treason (I mean by the statute of Edw. III.) there can be no doubt; yet the judges proceeded in their construction of the law so as to suit the views of the crown, and consequently established this principle: that if one witness prove one overt act, and another prove another distinct overt act, it will be sufficient to convict the party accused; that after proving one act laid, by one witness, they might prove another act of the same kind in a different place, by another witness.

Gentlemen on the side of the prosecution pretended

that when an act was proved in one county, they might go on and prove other acts in another. One of them says he cannot conceive why it should be otherwise, or what inconvenience can result from it. Had the gentleman attended to the shameful manner in which that doctrine had been introduced, he would not have given this construction of it. They went on the principle of proving two distinct acts of treason: that if one witness proved one act, and another proved another act of the same kind of treason, this was complying with the law. In order to prove it, gentlemen said, that if they proved a fact in one county, and another fact in another, they satisfied the law. But they must first determine that there was one overt act committed before they can say that treason has been committed; and the overt act must be proved by two persons. The absurdity of their doctrine must be apparent. They must certainly prove one overt act completely, as the law requires, before they can proceed to another; otherwise two acts of treason will be proved, each of them only by one witness, and neither by two witnesses; so that the testimony of one will derive no confirmation from that of the other. No man abhors such doctrine more than I do. None would more reluctantly sanction it, especially to gratify the vengeance of a monarch or any other person in authority.

Chief Justice. — Was it not necessary, before the statute of Edward passed, to produce two witnesses to the same overt act?

Mr. Martin. — No, sir. The distinction was this: The act of Parliament intended that there should be two witnesses to each overt act; but the judges adopted a construction deemed acceptable to the crown, and admitted proof of one overt act by one witness and of another by another. The law also required, that in every case (even that of compassing the king's death) the facts should be laid in the county where the crime was committed; yet wicked and arbitrary judges determined that laying one overt act in the county should be sufficient, and another might be proved in another county. All this was inconsistent with common reason, common sense, and common humanity; and thus a law which was intended as a security against oppression was rendered comparatively but

of little value to what it would have been, if candidly and uprightly construed by honest and independent judges. This statute of Edward III., explained by the statute of Edward VI., provided that no person should be convicted by confession except in open court; yet those wicked and arbitrary judges destroyed this provision altogether, and construed it to mean that any person might be convicted by proof made by two witnesses of his confession out of court, or anywhere; as by two persons coming into his prison, without giving any proof of an overt act even by a single solitary witness but the person's own acknowledgment. This was putting it in the power of two persons, by perjury, to take away the life of any man; for such evidence in its nature could not be controverted; for how could he prove that he had never made such a declaration or confession? The law certainly meant that no person should be convicted on any confession unless made in open court on arraignment (according to the genuine principle of which, the provision in the constitution of the United States has been wisely made), instead of this extrajudicial confession, which, of all kinds of evidence, is the most difficult to be opposed or contradicted.

Having shown that the kind of prosecution used generally in England was founded on that particular view (the safety of the life of the monarch), and that abuses of the courts took away the security which the law intended, I shall make some further observations on the kinds of proof necessary in other kinds of treason. In fixing the crime of treason in case of the violation of the queen, the act of violation must be committed. It would be requisite to prove an actual violation, the same as would be requisite in the case of rape. In like manner, in the case of treason for aiding and assisting the king's enemies, the prosecutors must prove the act of aiding and assisting. It is precisely of the same nature; and the conduct of the prosecution must be the same. The act in which the criminality is said to consist must be proved.

So in the case of levying war against the king in Great Britain, or the United States here, the act of levying the war must be proved. War cannot be levied

without an act. The levying of war consists of an act or acts. It is not the intention of the mind to levy war that constitutes the levying it. When war is charged to be levied, it must be proved. It must be also proved that the act was done against the government. In either Great Britain or America, the object of the war levied must be to subvert the government. In this country it must be to destroy the present system of federal government. I believe I am correct when I say that it must not be a quarrel of a private nature, or have any other object in view than an opposition to the government. Whatever violent acts may be committed, and however great a number of men may be collected together, it would not be a levying of war, unless the intention were in some manner to subvert the present government. It would only be a great riot.

I should be happy to be better informed, if I be mistaken, but I consider it as clear law that if a number of persons conspired and assembled together even in a riotous and turbulent manner, and some of the party killed an officer of the United States, it would certainly not be a levying of war against the United States (however highly criminal the assemblage and this act would be), without any intention to subvert the government.

I have already stated that there must be an overt act laid in all indictments. I will now show that it ought to be laid for the very purpose of letting the party accused know what is the specific charge on which he is prosecuted and called on to give evidence and make his defence. The following authorities will establish this position: 1 *East's Crown Law*, 116, states that "in every indictment for high treason upon the statute 25 Edw. III. for compassing the death of the king, or of such of his family as are therein named, or for levying war, or adhering to his enemies, the particular species of treason must be charged in the very terms of the statute (being a declaratory law), as the substantial offence; and then some overt act must be laid, as the means made use of to effectuate the traitorous purpose." "The overt acts so laid are in truth the charge to which the prisoner must apply his defence; and therefore it is in no case sufficient to allege that the prisoner compassed the king's death, or

levied war against him, or adhered to his enemies; *for upon a charge so general and indefinite, he cannot know what acts he is to defend.*" *Sir Matthew Hale*, in the first volume of his *Pleas of the Crown*, pages 121, 122, supports the same principle. He disapproves of the concluding part of the resolution of the judges, touching those who were assembled at Farley-Wood, in Yorkshire; divers of whom were indicted and attainted of treason for compassing the death of the king; and which concluding part is in these words: "*Fuit auxi agree, que si un overt act soit lay en le enditement et le proof est dun autre overt act, de mesme le kinde, ou species de treason, ceo est assets bone evidence.*" On which Sir Matthew observes, "I must confess that I could never assent to this last part of the resolution, though I know it was so practised in criminal cases in the Star Chamber; for I have always thought, 1st, that the overt act is an essential part of the indictment; 2d, as it must be laid, so it must be proved; for otherwise, if another act than what is laid should be sufficient, the prisoner would never be provided to make his defence; 3d, that more overt acts than one may be laid in an indictment, and then the proof of any one of them so laid, being in law sufficient overt acts, maintains the indictment; 4th, that if any overt act be sufficiently laid in the indictment and proved, any other overt acts may be given in evidence to aggravate the crime, and render it more probable." These authorities show that an overt act must be laid, and *proved* as well as laid; and that the prosecutor cannot state or go into evidence to prove a general charge in the indictment; because no man could be prepared to make his defence against such a charge.

I refer your honors, also, to 2 *Hawk.*, chap. 46, sec. 34, to show that though where one is indicted for high treason in compassing the king's death in one county, and the levying of war in the same county is laid as an overt act of such treason, and proved in the same county by one witness, the levying of war in another county may also be proved by another witness. Yet it was agreed at the same time *that where the levying of war is the treason for which the party is indicted, it must be fully proved in the county in which it is laid.*" — Also, —

"That at this day the levying of war can in no case be given in evidence as an overt act in any county in which it is not laid, unless it tend to prove some overt act that is expressly laid;" which *Mac Nally* adopts as a rule, page 505. And in *Kelyng*, 15, "it was resolved, the treason laid in the indictment being the compassing of the king's death, which was in the county of Middlesex, and the levying war being laid only as one of the overt acts to prove the compassing the king's death, though this levying of war be laid in the indictment to be in Middlesex, yet a war levied by him in Surrey might be given in evidence; for being not laid as the treason, but only as the overt act to prove the compassing, it is a transitory thing which may be proved in another county. "*But if an indictment be for levying war, and that made the treason for which the party is indicted, in that case it is local, and must be laid in the county where in truth it was.*"

Here we see that in indictments for treason in compassing the death of the king, where the offence is laid in one county, and levying of war in the same county is laid as an overt act of such treason, and proved in the same county, the levying of war in another county may also be proved by another witness. They have taken up this idea as a rule of law: that the overt act of compassing the king's death must be considered as transitory, and not local, as it is in indictments for levying war. But both these writers concur in stating that *where the charge is levying war, the crime is local, and must be laid where it was really committed, and fully proved where laid.*

This doctrine is stated and approved in 2 *Mac Nally*, 504, 505, who makes it in substance his fourth rule, under the head "*of proving* the certainty of the place laid in the indictment." He also refers, in confirmation of it, to the case of Deacon, in *Foster*, 9, where an objection was taken by the prisoner's counsel: that a fact proved was not committed in Cumberland, the county where the venue of all the overt acts was laid; but where Justices Abney and Foster held that "it was indeed necessary on that indictment that some overt act laid be proved on the prisoner in Cumberland; but that being done, acts of treason tending to prove the overt acts laid, though done

in a foreign county, may be given in evidence." So that the proof of this act of treason, done in another county, is not admitted unless it be direct evidence of the overt act laid in the indictment, and only after that has been proved.

These decisions do not affect the general principle, that treason is local, and must be proved where laid. But an authority, which seemed to be relied on to disprove it, is, that Lord Chief Justice Willes did not give an opinion on the second point.

In Deacon's case the court was unanimous on the first point: that an overt act not laid may be given in evidence if it be a direct proof of any of the overt acts laid; but Lord Chief Justice Willes declined giving any opinion on the second point: the giving evidence of overt acts in a county different from that where the fact was laid, an overt act having been first proved in the proper county. But this sort of evidence, Foster says, was given in almost all the trials referred to by him.

The rebel army had marched in warlike array from Manchester to Carlisle. Deacon was with them, and taken in the latter city. The indictment charged him with levying war; and the overt act was laid in marching into Carlisle, and taking possession of and holding it. He was found with the rebel army; and the question was, whether he were there with a criminal intention; that is, whether he had voluntarily joined them, or happened to be there accidentally. To show that he had joined them, and that his intention was criminal, they proved on his trial that he was with the rebel army at Manchester, in a hostile manner; and that while there he compelled a printer to publish a manifesto for the pretender, and was seen marching with them. This merely shows the intention; i. e., *quo animo* he joined them. What could be a stronger proof of the intention wherewith he joined this army, than that he was found marching with them, and compelled a printer to publish a manifesto in favor of the pretender? It certainly was not an act of levying war to compel a printer to publish a manifesto; but it showed *quo animo* he marched and continued with them; and a British statute made all persons who declared for the pretender guilty of treason. It was an

overt act of that species of treason, but not of levying war, which consists of acts, and not of designs or intentions of the mind ; and which acts must be pursuant to an intention to levy war.

So in Wedderbourn's case, it was proved by two witnesses that he was with the rebels at Aberdeen, where the overt act of treason was laid ; and that he was, at other places with them. The question, then, was, with what intention the prisoner was there. The counsel for the crown called witnesses who proved likewise that he was appointed by the pretender's son collector of the excise, and that he did actually collect the excise for the use of the rebel army. The prisoner's counsel insisted that this species of evidence ought not to be admitted ; "for though collecting money for the service of rebels is an overt act of high treason, yet not being laid in the indictment, in which the overt acts charged were laid as acts of levying war, no evidence ought to be given of it. But they were overruled for the reason before assigned in Deacon's case. There was no question made about his patriotism and pure motives. His counsel pretended that he was compelled to join them and collect the excise ; that he had taken no active part with them ; that his father had collected the excise under the king. But it was proved that he was there with them the whole time, and that he accepted and acted under the appointment of an officer of the excise under the pretender. Collecting the excise is not an act of levying war, though made treason as aiding and declaring for the pretender, by the statute made on that subject. But his having collected the excise, and being found with that army, would have shown his intention — that he intended to depose the king, and place the pretender on the throne. The utmost extent that you can go in such cases is that you may show the *quo animo*, or object and intention of what happened.

I will trouble your honors by recurring again to the authority of Vaughan's case, in 5 *State Trials*, 17–38, which is acknowledged to be law, and which is in point to show what ought to be proved to support an indictment for levying war or adhering to the king's enemies ; and where a decision is in favor of life and liberty, it

ought to be prized beyond everything. Such a decision may be considered as a landmark for the security of life and liberty, and cannot be too much relied on, or too often referred to.

Vaughan was indicted of treason in two counts: one for adhering to the king's enemies, and the other for levying war; but the first charge of adhering to the king's enemies was principally insisted on. The indictment goes into specific facts to show in what manner he did aid and assist the enemies of the king. It states, after the usual preamble, that "the said Thomas Vaughan did by force and arms, falsely and maliciously, wickedly and traitorously, aid, help, and assist the enemies of our said lord the king, in the ship of war called the Loyal Clencartie; and that the said Thomas Vaughan, in the execution and performance of his said aiding, helping, and assisting, maliciously, falsely, and traitorously, in the said ship of war called the Loyal Clencartie, sailed a cruising to several maritime places within the jurisdiction aforesaid, by force and arms to take the ships, goods, and money of our said lord the king and his subjects." This was the overt act, and the evidence to which he was to apply his defence. So much for the count for aiding and assisting the king's enemies; now comes the count for levying war. It charges that "he falsely, maliciously, devilishly, and traitorously, by force and arms, with divers other false rebels and traitors (to the jurors unknown), war against our said now lord the king, prepared, prompted, levied, and waged; and that the said Thomas Vaughan, in performance of his said war and rebellion, then and there, by force and arms, maliciously, wickedly, and openly, assembled and joined himself with several other false traitors and rebels (to the jurors unknown), to the number of fifteen persons, being armed and provided in a warlike manner, with guns and other arms, as well offensive as defensive. And the said Thomas Vaughan, then and there being on board the said ship of war called the Loyal Clencartie, assembled with the other false rebels and traitors as aforesaid, maliciously, wickedly, and traitorously, sailed a cruising to several maritime places, with the aforesaid ship of war called the Loyal Clencartie, with an intent to take, spoil, and carry away the ships,

goods, and money of our said lord the king and his subjects, by force and arms," &c.

The overt act of levying war laid in the second count, and to which also his defence was to be applied, is nearly the same as that in the first: that he sailed a cruising, in the vessel called the Loyal Clencartie, to several maritime places, to destroy the ships, goods, and money of the king and his subjects; except that in the second count it is added, that in performance of the war and rebellion, he assembled and joined himself with other traitors, to the number of fifteen, armed and provided in a warlike manner with guns and other arms. No other act of adhering or levying war is stated.

The counsel for the prosecution offered evidence to prove that the prisoner had at another time cut away the custom-house barge, and the court solemnly decided that on an indictment for levying war, or for adhering to the king's enemies, with specification of some overt act, or the manner in which the war was levied, or in which the king's enemies were adhered to, the evidence ought to be confined to that overt act alone which is charged; and that no other overt act of levying war, no distinct overt act of aiding or assisting the king's enemies, could be proved except those laid; that acts done by the same persons at other times and places, in aiding and assisting the king's enemies, could not be given in evidence, not being laid in the indictment; and that acts done in any other vessel than the Loyal Clencartie could not be given in evidence. The court did not permit the prosecutor to give the act of cutting away the barge in evidence, even to support the probability that war was levied, or that the king's enemies had been aided; and for the best reasons. The statute required that a person should only be convicted on full proof, by two witnesses, that the overt act was done. If the charge were not so proved, it was contrary to law to go into other evidence.

The gentleman who opened the cause said that this evidence was not sufficient to convict him of treason in levying war. But, certainly, when charged with aiding and assisting the king's enemies, it was sufficient to establish his guilt as a traitor for aiding them, that he cruised in the service of those enemies for the purpose of taking or

destroying the ships and property of the king and his subjects. It was not necessary to decide the question of levying war. There was no necessity for a decision of the court on that point.

This decision, which has thus established this doctrine, is recognized by *Foster*, 246, and not shaken by the case of Deacon, or Wedderbourn, or any other authority. It was not an overt act of levying war, but an independent, distinct act from those charged in the indictment. But the court determined on this case, that his having a treasonable disposition, and his having taken the custom-house boat, could not be given in evidence on his trial, even to show *quo animo* he did the crime in the Loyal Clencartie. *Foster*, 246, approving of the rejection by the court of the evidence relative to the custom-house barge, in Vaughan's case, adds as a reason that if it were true that he had taken this barge, "it was no sort of proof that the prisoner had cruised in the Loyal Clencartie, which was the only fact he had then to answer for." The authority of this case is also recognized in 2 *Hawk. P. C.* chap. 46, sec. 34, and *Mac Nally*, 507.

It is said in Foster, in the same page, that distinct acts of levying war, from those stated in indictments, cannot be admitted in evidence to support them ; and that the rule of rejecting all manner of evidence in criminal prosecutions, that is foreign to the point in issue, is founded in sound sense and common justice. This doctrine is strictly applicable to the case now before the court. For instance, an overt act committed at the mouth of Cumberland is distinct from an overt act on Blannerhassett's Island ; and no act done in Cumberland can be given in evidence to prove an act on Blannerhassett's Island, any more than an act done in the boat could be given in evidence to show *quo animo* the act in the *Loyal Clencartie* was committed. It is not consistent with reason that one should be direct evidence of the other ; that an act committed ten months before should be evidence of what was done then.

Here we are only called upon to answer for what happened at Blannerhassett's Island. For that only we are now accountable ; but according to gentlemen's doctrine, fifty acts committed at other places could be received as

evidence in support of it. This would be a convenient mean for men who wish to destroy their enemies. Would this be correct or just? Foster construes the law on this point very differently from the gentleman on the other side; who has repeatedly expressed so much abhorrence of the common law, that he wishes the whole rubbish of it to be thrown away; and declared that common sense would be an infinitely safer rule to decide this case; as he says it is in determining controversies between man and man. This guide to which he has so often referred us, I believe, would not conduct us to the same point. For I am sure that *his* common sense, from the specimen we have had of it, would be as unintelligible to me as the common law would be to that gentleman.

The law is clearly settled as I have stated it. It has been so decided not only in Vaughan's case, but many others. There is no decision to the contrary. The cases of the queen against Damaree and Purchase cannot be considered as forming an exception to the general rule; and if the doctrine contended for by the prosecution were to prevail, the insertion of an overt act would answer no purpose whatever.

Chief Justice. — The argument there was, that an overt act was not necessary to be particularly stated, and that the charge might be laid in general terms; that is, as I recollect it, that it was sufficient to state that the accused with a multitude of armed men assembled in warlike array to effect their purpose.

Mr. Wirt. — In the case of Lord Balmerino, the first charge in the indictment was general; it was for levying war against the king; that he, on the 10th day of November, in the 19th year of the king's reign, assembled and joined with a great multitude of traitors, armed and arrayed in a warlike and hostile manner, and prepared, waged, and levied a public and cruel war; and then a special charge was added: that he entered into and took and held the city of Carlisle. He objected, first, that he was not there on the 10th of November; and, secondly, that he was not there when it was taken. His objections were overruled: the first, because the day is not material; and the second, because he marched into the city after it

was taken, and held it for the pretender. But it was certainly considered that the first general charge, proved by his marching with the rebel army, would have been sufficient, even if it had not been proved that he entered into Carlisle, and held it for the pretender.

Mr. Martin. — Lord Balmerino's was a clear case; but he did not understand the inutility of those objections, or he would not have urged them; as he afterwards declared himself. The indictment charged that he entered and took possession of Carlisle on the 10th of November; and the fact was, that he did not enter it until the next day after it was taken. His objection was, that the indictment did not state the facts properly. He thought that all the indictment must fall, if any article or part of it were not proved as charged; and that the day was material. It appeared that he came into the city on a different day from that charged in the indictment; but it did not expressly charge him with being there when the city was taken, though it might be inferred from the terms of the accusation. But it was proved against him that he entered the city at the head of his troop, and then held possession of it for the pretender. The indictment charged that he, with a great multitude of traitors and rebels, to the number of three thousand, in warlike and hostile array, with offensive and defensive arms, &c., did assemble and join himself, and traitorously did prepare, order, wage, and levy war. It is not stated that *they* levied war, but that *he* levied and waged the war together with them. The overt acts charged are, that he levied the war with those traitors and rebels armed and arrayed in a warlike and hostile manner, with offensive and defensive arms, &c., and that he entered and took possession of Carlisle. The charge of an overt act is always indispensable; but it must be proved as laid. And overt acts neither charged nor being evidence, in themselves, of those charged, are never admitted in proof. In Vaughan's case the indictment stated that he levied war; but it stated also that he adhered to the king's enemies; and it went on and charged what was done in the Loyal Clencartie. The indictment against Lord Cromartie is like that against Lord Balmerino. It first charges that he levied war; that he, with a number of persons

armed in military array, did levy war; and then it goes on and states the overt act of his going into and holding the city of Perth — and it was proved that he went into Perth and held it against the king's forces. The cases are similar: in each the overt act was distinctly proved.

It is admitted that some overt act of war must be proved. But I do not know that I shall enter into a contest to show that a mere assemblage would be insufficient to constitute such an act. But there is an overt act laid in the indictment: that there was an assemblage armed and arrayed, and that they took boats or canoes and proceeded in them down the river to seize and take New Orleans; which is something more than a mere assemblage; and this must be proved as laid. In the cases of Damaree and Purchase, 8 *St. Trials*, 218, 268, there was an overt act of war laid, or they were charged with compassing the queen's death.

Chief Justice. — The indictments in those cases charge levying war.

Mr. Martin. — I shall for the present leave part of my argument unfinished. I shall only make this observation: Our constitution has made it absolutely necessary that an overt act of levying war should be laid in the indictment. It must be laid in the district and state wherein it was committed, and proved in the county wherein it is laid. It is therefore not material what the precedents in Great Britain may state. What the constitution prescribes must be obeyed. We must therefore refer to the indictment.

I ask, What is the overt act laid in this indictment? And I shall endeavor to show that there cannot be such a constructive presence as the counsel for the prosecution contend for. In the first count, it is alleged that the accused levied war. Gentlemen have given no evidence in support of this count for levying war but an assemblage of men. But they must prove the overt act which they have alleged: an assemblage of men armed in a warlike and hostile array on the island for a treasonable purpose, at the time and place charged. Instead of proving any war, or any act of levying such war, they have only shown a mere *unarmed* assemblage of a few men. There is therefore a total failure of proving this count. There is

no proof of anything like a war.. There is no evidence to show that there was even an *armed* assemblage on the island.

As to the second count: it states that there was an assemblage of armed men to subvert the government of the United States; and that in order to carry their traitorous intentions into effect, and carry on the war against their country, they arrayed themselves in a warlike manner, with arms, &c., and proceeded from the island down the Ohio, with the intention to take possession of New Orleans. This count is equally unsupported. They have admitted, and we have proved without their admission, that Colonel Burr was more than two hundred miles from the island. I ask, therefore, How could he be considered as constructively present on the island? The men assembled themselves there in his absence. As he was in fact in Kentucky at such a distance, by what construction could he have been on the island? Could he reappear in an instant on the island? Did they set off together to the island? Was he so near it as to be able to give them immediate or speedy assistance? When the militia of Wood County were marching against them, was he near enough to give them any aid or assistance? Could he by the attribute of ubiquity be on Blannerhassett's Island and in Kentucky at the same time? There is no evidence of any war or violence, or anything being done anywhere. Is this specific charge, that he levied war on Blannerhassett's Island, made in consequence of his being able to give them aid or assistance, or notice to run for it? If the persons assembled at the island were informed by a communication from him at the distance of two hundred miles that they ought to make their escape, if at such a distance he gave them notice that they were in danger and ought to run for it in order to avoid it, he was far from being accessory to treason or any other crime. Instead of advising or abetting a crime, if any were meditated, he prevented it. I am sure it is beyond my conception how he could, on any correct principle, be *legally* present or constructively guilty either as principal or accessory. If the gentleman's position be correct, I must repeat the argument used by the gentleman who began the motion, and which they only attempted to an-

swer by endeavoring to throw ridicule and contempt on it, as they could not oppose it by fair reasoning. Their construction is as variant from universal usage as it is repugnant to correct principles. No instance can be adduced of such a construction having ever been sanctioned in practice. Crimes have been heretofore prosecuted according to the truth of each case; and the accused have been only charged with having been guilty where they were really committed. Those who had committed treason, who had levied war in Carlisle, were charged as having levied the war in Carlisle. Those who were accused of having levied war in Perth were charged as having done so; and those who levied war in Aberdeen were indicted as having levied war there only. But if the counsel for the crown in Great Britain had found out this new doctrine, discovered by the ingenuity of the counsel for this prosecution (that individuals who engaged in the same war, carried the war through those two kingdoms; that those who were absent when Carlisle, Aberdeen, and Perth were taken, were constructively present and equally guilty with those who were actually present), prosecutions would have been easily conducted and much trouble saved. If gentlemen's new doctrine be correct, all persons engaged in the rebellion of the year forty-five (or any other) belonged to the same army. It would only have been necessary to state and insist that by constructive presence a person who levied war at Perth might be charged as having levied it at Carlisle, because he was connected with the army. Proving presence in any one place, would be proof of presence in all places. This is the inevitable result of this new doctrine.

If this new doctrine be, as gentlemen affect to believe, unanswerably correct, then it shows incontrovertibly great ignorance on the part of the lawyers who prosecuted in Great Britain, in encountering so much unnecessary trouble and adopting a mode of prosecution so difficult as they did, and the superior ingenuity of the gentlemen in discovering this very easy and plain mode.

If gentlemen, by giving him this constructive presence, can charge Colonel Burr as present on the island when he was at the distance of two hundred or two hundred and fifty miles, surely the lawyers who prosecuted in that

county might have indicted and prosecuted the accused where most convenient to themselves, without any regard to the places where the crimes imputed were really committed. They might have charged a person who committed an act of levying war at Perth, as "having been guilty of it at Carlisle or Aberdeen," which is only thirty or forty miles distant. If this constructive presence can by legal fiction be extended from that proximity, whence immediate aid can be afforded, to the distance of more than two hundred miles, certainly it might have been carried thirty or forty miles; and if the law had authorized it, that very easy and convenient mode of prosecution would have been pursued; but such an idea, so oppressive a construction to the accused, never was entertained in that country; and I am confident never will be tolerated in this.

Having, then, I flatter myself, said enough to put an end to the argument of gentlemen, and shown that there can be no such constructive presence as they advocate, I shall now proceed to examine what was the situation of the accused, supposing there was no such thing as constructive presence; because when persons are constructively present, they are never called accessories before, but principals. If a person be at all guilty, but neither actively nor constructively present, he must be an accessorial agent. I shall endeavor to show that there is no difference in law between those whose accessorial agency is before the commission of this crime, and those whose accessorial agency is after it.

It is admitted that those who are accessories after the fact in treason, should be indicted specially; that the particular facts which render them traitors by relation after the treason is committed, should be specially set forth. I shall endeavor to show that the law is the same with respect to accessories before the fact; that it requires the same specification of accessorial guilt before, as it does after the fact. By accessorial agents before the fact, I mean those who advise, procure, or command it to be done. By accessorial agents after the fact, I mean those who received, comforted, concealed, or protected from justice any person who has committed treason. Between accessories before and after the fact, in

murder, felony, or any other crime, there is no distinction in law; as to those who receive after and those who direct before the fact, in all felonies and other inferior crimes, the principles of the law are the same. It is a principle of the common law, that he by whose agency a felony is done, who advises, procures, or commands it to be done, is guilty of the felony himself; that is, as an accessory. The reason is, that by advising the actor to do it, he has made the act his own. Another has done the act, but he has made it his own by advising or procuring him to do it; and another has done so by receiving or comforting him who has committed it. He who knowingly receives or comforts, or has given his approbation of a felon, or protects or endeavors to protect him from punishment, does thereby make the act his own, and becomes a felon.

Let us examine the principles of common reason and common sense, by which Colonel Burr ought to be made liable for the acts of others done in his absence. The person who advises the commission of a crime, it is said, is more criminal than the person who, in consequence of the advice, commits it. "If he inciteth to the offence, some say that he is *quodam modo* guilty of the fact." In *foro cœli*, he is considered equally guilty with the real perpetrator; and if the advice be not pursued, the adviser only is in *foro cœli* guilty. But let us examine whether those who advise murder, robbery, or larceny to be committed, be equally guilty in law, in *foro seculi*, with the actors of those crimes. The man who advises a murder is frequently more guilty, it is said, than he who does the act. In *foro cœli* he is just as guilty as if he had done the act in person. But would that prove that the man who advises a murder to be committed should be considered as the actor, and prosecuted for it as the actor himself? Although their criminality may be equal, yet the offences of the adviser and actor are specifically different in their nature. If the adviser is to be prosecuted as an actor, you would, on principles of common sense, strike out of the very list of criminals all accessories before the fact. But, sir, on that principle, there would not be, as to felonies, any accessories; but all must be indicted as principals. These remarks apply to the cases

of robbery and larceny as well as to that of murder. And as to treason, all who are implicated in it in any manner are equally punishable. But still it is necessary that every person charged with a crime should have notice of what he is accused, and know how to defend himself. It is not denied that he who incites or instigates another to perpetrate a crime may be considered as its author; as without the incitement or instigation, the crime could not exist. But though the prime mover of any criminal act may not be inferior in iniquity to the instrument whom he employs, yet that does not prove that every person accused ought not to be charged according to the truth of the case; as otherwise he could not know how to defend himself. [Here Mr. Martin referred to *Foster*, 361, 362, which see fully quoted before.] Here, then, the doctrine, according to common sense, is with me. The degree of wickedness or atrocity does not supersede the necessity of notice by a specification.

I now come to pursue the idea before suggested, that those who are guilty of accessorial agency before and after the fact, are in the same situation: to show that there is no difference between them, and that accessories after are equally as guilty as those before the fact in treason, I will refer to 2 *Hawkins, P. C.*, chap. 29, sec. 3: "It was formerly a question whether the same receipt of an offender, which will make the receiver an accessory after the fact in the case of felony, will make him a principal in high treason, *as it seems to be settled at this day that it will.*" To justify which opinion this author goes on to show, that if the law were otherwise, if it should be adjudged a misprision only, as some had contended, it would be less criminal, and subject to less punishment, to receive a traitor than a felon; and that the receiver of a felon is certainly liable to judgment of death. It is immaterial what was the doubt formerly in Great Britain as to this point, since it has long ceased to exist. It was adopted from *Dyer*, 296 (*a*), where there are two cases reported on the subject of coining false money. The first is the case of "John Conier, who was indicted for traitorously receiving John Fairfax, knowing the said John Fairfax falsely and traitorously to have counterfeited divers pieces of money of false metal, to the similitude of good

and lawful money of England called shillings." He was found guilty, but the justices did not proceed to judgment of treason upon this indictment, because it is only misprision of treason. In the other case, three were indicted for misprision of treason, for counterfeiting false money, were found guilty, and pardoned. Hawkins refers also to 12 *Coke*, 81, 82; 3 *Inst.*, 138, and other authorities. But notwithstanding this decision in Dyer, there were some doubts whether the receiver of a person guilty of coining false money were not guilty of treason. Whatever doubts might have been entertained about the guilt of the receiver of a coiner, there was no doubt expressed, or anything said, about the general principle; and it has been long considered by all respectable authors as a settled, unquestionable doctrine, that accessories after the fact in treason are as guilty, and as highly punishable, as accessories before.

Having thus established the position that there is no distinction in treason between those who advise, procure, or command the act to be done and those who afterwards receive and comfort the traitor, let us examine how this indictment ought to have been drawn, as the evidence has come out, against Colonel Burr. We say that it ought to charge him, according to the truth of the case, as an accessorial agent before the fact of levying war was committed. It ought to have stated that such and such persons had levied war on Blannerhassett's Island by some overt act — as, for instance; that those persons, as an armed assemblage, committed an act of treason in levying war, and that Colonel Burr had abetted, advised, commanded, or procured their acts to be done — distinguishing the facts specially according to the truth.

Gentlemen say that they can find no precedent whatever of this specification, except in the cases of those who have received a traitor after he had committed treason. If I understand gentlemen well, they admit that in Great Britain all those persons who have been prosecuted as accessorial agents after the fact have been charged specially; that the indictments against them must show that some person has committed treason, and that the person indicted has received, comforted, or protected the traitor. This they admit to be correct; and the precedents are all

so. I shall argue on these precedents presently. But I contend that it is necessary to indict specially, or according to the facts, in all cases. In 1 *State Trials*, 63 to 78, the indictment against Sir Nicholas Throgmorton for levying war against the queen (in connection with Sir Thomas Wiatt, who raised an insurrection in Kent) is full and special. In the same book, page 134, an indictment is drawn against several persons in a most special and particular manner. Edward Abington, Charles Tilney, Edward Jones, John Travers, John Charnock, Jerom Bellamy, and Robert Gage were tried for high treason in compassing the death of the queen, and conspiring in what manner to invade the kingdom, what aid and assistance might be procured for the same, and by what ways and means Mary Queen of Scots might be delivered from her captivity. The indictment specially charges, that whereas Bernardyne de Mendoza, Charles Paget, and John Ballard, at Paris, in France, on the second day of April, in the twenty-eighth year of the then queen, Elizabeth, did confer in what place the invasion of England might be effected, what aid could be procured for the same, and by what means the said Mary Queen of Scots might be delivered from custody, divers of the prisoners, particularly named, took different parts, particularly specified, to carry into effect the said several purposes; that the four first-named prisoners did, on a day named, stir up rebellion and sedition in the realm, and did procure and stir up divers strangers, her majesty's enemies, to invade the realm; that the two first-named prisoners and others went, on another day specified, to St. Giles's to confer, and did confer, by what ways and means their traitorous imaginations might be brought to pass, and did conclude that the prisoner C. Tilney and two other persons should kill the queen, and aid the foreign enemies that should invade the realm; that the prisoner E. Jones and another went to the same place, on another day, to confer for the same treasonable purposes; that on another day the same two persons did conclude and traitorously agree to join for the delivery of the said Mary Queen of Scots, and to aid and assist the foreign enemies that should invade the realm; that the prisoner John Travers did, on another day named, go to Clerkenwell to confer,

and did confer, how the traitorous-compassed imaginations aforesaid might be brought to pass, and did conclude to join T. Salisbury for the delivery of the said Queen of Scots, and in aiding and assisting the foreign enemies that should invade the realm; that the prisoner and three other persons named did traitorously conspire to depose and kill the queen, and that the said John Charnock did traitorously go, on another specified day, to Southampton House, in Holborn, and confer there with John Ballard how the traitorous imaginations aforesaid might be brought to pass; and it concludes "*that the prisoners, Jerom Bellamy and Robert Gage, knowing that Anthony Babington, Robert Barnewell, and Henry Donn had committed high treason at Harrow*," &c., "*did receive and aid them*," &c.

The several charges in this indictment are certainly very full and circumstantial; but in the same book, page 127, the indictment against Anthony Babington and others, for similar charges, is still more full and special.

The indictment against William Ring, in 4 *State Trials*, 131, was very specially drawn, as hath already been shown by a gentleman who has preceded me. I will only observe that it concludes that he, "well knowing Joseph Kelloway and Henry Laurence to be false traitors, and, as false traitors, traitorously to have conspired and imagined the death of the king, and war and rebellion against him (with divers other traitors unknown), to have levied, raised, and stirred up," &c., "the said Joseph Kelloway and Henry Laurence, at the dwelling-house of the said William Ring, knowingly, wickedly, secretly, and traitorously, did harbor, conceal, sustain, and maintain, and then and there, for the comforting," &c., "of the said Joseph Kelloway and Henry Laurence, he, the said William Ring, meat and drink to the said Joseph Kelloway and Henry Laurence did give and deliver," &c.

The indictment against Lady Alice Lisle, 4 *State Trials*, 106, is equally special and descriptive of her having knowingly received and comforted a traitor. It charges, after the usual preliminary part, that she, "well knowing one John Hicks, clerk, to be a false traitor, and, as a false traitor, traitorously to have conspired and imagined the death and destruction of the king, and war and rebellion

against the king," &c., "to have levied and raised, the said John Hicks, in her own dwelling-house, secretly, wickedly, and traitorously did entertain, conceal, comfort, uphold, and maintain." It then adds, like the indictment against Ring, that she gave him meat and drink, &c.

Stanford's Pleas of the Crown also shows that persons accused are specially indicted for treason, according to the truth of every case.

These last cases prove the necessity of specially indicting receivers of traitors after the fact. And in *Anderson's Reports*, 109, after great deliberation, it was determined by the judges that indictments for procurement of treason should be specially drawn. Sommerville, by the persuasion and procurement of Edward Arden and wife, went to kill the queen, and carried instruments with him on purpose. It was after deliberation settled, that in an indictment against all three for compassing the death of the queen, he should be charged for doing the act, and that they should be specially charged for having procured or persuaded him, precisely according to the truth of the case. In short, it was deliberately adjudged "*that procurers of treason should be specially indicted for the procurement*," which is the very point on which we now insist.

Indictments should be special to enable the prisoner to know what to turn his attention to, and that he may not be compelled, on a general charge, to defend all the acts of his life, by which the most innocent man on earth might be surprised. In indictments for compassing the death of the king, the charges are as special as the nature of the case admits of; that is, the overt act evidencing the intention of the mind to compass the death is specially set forth in every case. Sommerville was charged with what he actually did — with having proceeded with arms to a certain length in order to carry his compassed imaginations into effect; and Arden and wife, who procured him, were charged upon their procurement. In that case it was determined that the overt act should be specially laid (as we say it ought to be here) in order that the accused might know what defence to make.

The case of The King *v.* Mary Speke, adduced from *Tremaine's Pleas of the Crown*, 3, is directly in point.

She was charged with aiding and assisting the Duke of Monmouth while the war was actually levying — with having sent him cart-loads of provisions, &c., in order to aid and assist him in levying war and rebellion. But the indictment states expressly that she did so "well knowing the said James Scott to be a false traitor, and that he and many other false traitors, to the number of four thousand persons at least, had unlawfully assembled, and traitorously levied war and rebellion within the realm against the king." They who only aid and assist, by sending provisions or military stores or information or intelligence that may be useful to the enemy, are all considered as accessories before the fact in treason. He who commands treason to be committed, if not present himself, is never said to be an aider or abettor of the treason, but an accessory before the fact. Mary Speke, by aiding and assisting in the manner she did, was indisputably as much a principal actor in that war as Colonel Burr could possibly be considered a principal actor in levying this war; and yet she was not indicted for levying war, but it was stated that others levied the war, and that she aided and assisted them. This indictment ought therefore to have stated that certain persons (named) levied the war, and that Colonel Burr advised, commanded, or procured them to levy it.

But gentlemen say that they have indicted Blannerhassett as well as Colonel Burr, and have proved that Colonel Burr was the adviser or prime mover, and occasioned the war to be levied. On this principle it would have been necessary to charge in the indictment against Mary Speke that she levied war; and it would have been supported by proof of her sending provisions to the Duke of Monmouth. According to this doctrine, proving that a person had commanded or procured others to levy war would be proper evidence to support an indictment charging that he was guilty of levying war personally himself, though done by those others in his absence. If this doctrine were law, Mary Speke would not have been indicted as she was. It would have been sufficient to charge her generally with levying war, instead of charging her specially, as she was here, with sending provisions to supply a traitor whom she knew to be such, and to have levied war and rebellion.

But this very case of Mary Speke will clearly show the convenience, justice, and utility of special, and the injustice and inconvenience of general, charges. If she had been indicted generally for levying war, or compassing the king's death, or adhering to his enemies, how could she have been prepared to prove that she had never sent provisions to Monmouth? She could not have been prepared to adduce such proof, although she might easily have procured it, had she been notified in the indictment that it was intended to be proved on her trial that she had supplied those provisions. Had she been so prosecuted, there would have been a strange variance between the charge and the evidence. Instead of supporting the allegation that she levied war, the evidence would only show that she had furnished some victuals, bread and cheese, &c. She would have been thus greatly surprised and oppressed. But as the indictment charged her with furnishing those provisions to supply those whom she knew to be traitors, she had the means of preparing testimony to disprove it if it were untrue.

In pages 279 and 280 of the same book (*Tremaine's P. C.*), the indictment against Charles Gerrard is special, as the case in Anderson. It charges him with compassing the death of the king; and that in order to bring his traitorous imaginations to pass, he, traitorously, with the Duke of Monmouth and divers other false traitors, did assemble, meet, and consult to raise and procure great sums of money and great numbers of armed men to levy and make war upon the king, and to take and seize the castle of Chester.

Here, instead of a general charge that the accused compassed the death of the king, or levied war, or adhered to his enemies, it is specially stated that he assembled with other traitors to consult how to raise money and men, and to take the castle of Chester; and this specification gave him full notice to prepare for his defence.

In 4 *State Trials*, 132, Henry Cornish is indicted for compassing the death of the king; and it is further specially charged against him, that in order to carry his wicked and traitorous purposes into effect, "he, the said Henry Cornish, falsely, maliciously, and traitorously

knowing James, the late Duke of Monmouth, William Russel, Esq., and Thomas Armstrong, knight, and divers other rebels and traitors, falsely, devilishly, and traitorously to have conspired the death and final destruction of the king, falsely and traitorously did promise to the said divers false traitors and rebels, then and there present, that he would be aiding and assisting in the treasons aforesaid, to be done, perfected, and brought to effect," &c. Here there was nothing more than a promise to be aiding and assisting in the commission of certain traitorous acts, which in felony would have been an accessorial offence. He is indicted, not for levying war, but the indictment states particularly and specially the part that he took; that the Duke of Monmouth and others being engaged in war, and he, knowing them to be so, and to have conspired against the life of the king, did promise to aid and assist them in the treason. Why was he not indicted for levying war? Because a general charge would have been improper. The form of that indictment shows that the overt act must always be set forth; that it is the act of treason against which the accused must defend himself. There is also a case in Stanford of an appeal, where it is stated that the party accused must be charged according to the facts which are intended to be proved against him; which corroborates the general principle respecting indictments: that every criminal accusation must be set forth according to the nature of the offence. Thus in Great Britain every indictment charges the facts as they are intended to be proved. Whether the accused have commanded, or procured, or counselled the crime to be done, whether he rendered a traitor aid and assistance, or only promised to do so, or whether he furnished arms, or supplied provisions, must be particularly described in the indictment. Every case of accessorial agency whatsoever must be specially set forth.

Gentlemen ask why there are not so many cases of indictments against accessories before the fact as against those after. The answer is, that in Great Britain most of the prosecutions for treason are for compassing the death of the king; and in indictments for compassing his death, he who advises it, by writing or otherwise, is as much a principal traitor as he who aids or assists in actually kill-

ing him. A party who converses on the subject is deemed a traitor; and the overt act is laid against him for compassing and consulting about the death of the king. Every act which evinces the intent formed in the mind of the accused against the safety of the king, as meeting to consult, writing a letter, enlisting men, preparing other means, &c., is admissible evidence to support an indictment for compassing or imagining the death of the king.

But it is quite different in prosecutions for levying war. They never state such acts as overt acts of levying war. There must be acts of violence; an actual war must be proved to exist; or, at least, sufficient must be stated to show that the party were in a posture of war. Where specific acts or particular circumstances, not amounting to the actual levying of war, or an adherence to the king's enemies constitute treason, they can only support an indictment for compassing the death of the king. This may safely be laid down as a general rule, from which there is no exception whatever.

Let us see whether the principle that requires a specification of the offence of receiving a traitor after the fact do not equally apply to the case of advising and procuring treason before the fact. The cases already mentioned sufficiently prove that there is no difference between them in this respect. Why is a receiver after the fact considered as a traitor? Because the law says that he is a principal in the treason. But it is as necessary to distinguish or specify the crime of advising treason, or that a person *said* a thing before the fact, as it is to distinguish the *doing* a thing, as receiving a person guilty of treason after the fact. Is there any distinction between them? Is not notice as necessary in one case as the other? Each is considered as a principal in the treason. It is surely as necessary to lay the receiver in the indictment as having done the principal act himself, as he has done that which the law says makes him a principal, as it is to charge the adviser with having performed the act of war himself because he has committed what makes him in law a principal. If he have done an act which the law says makes him a principal in treason, and it is sufficient in any case, however special the facts, to charge the accused generally according to the legal effect, then he may be

charged generally in every case; and there will be no necessity of a specification in any case. I ask, if a man who counsels the levying of war can be charged with levying war because he is a principal in treason, cannot the receiver be generally charged also with levying war, since he has done what makes him guilty of treason? The reason is in both cases the same. If, notwithstanding his having done what makes him a principal in treason, a receiver of a traitor must be specially charged, there is no reason in the world why a person who advises the commission of treason should not be charged specially. But there is a direct reason, stated in Foster, Hale, and Hawkins, why the adviser of treason should be specially charged — that in all other cases, except compassing the king's death, those who are to be considered as accessories (as far as relates to the mode of prosecution) cannot be put on their trial except the principal have been convicted; but they may be brought to trial together. Do not these authorities prove that the indictment must specially show who is charged as an accessorial agent and who did the act? that if they be not tried together, the indictment must show that the principal has been convicted, since till then he cannot be tried against his will? How is he to know, when indicted in this general mode, that they do not mean to charge him by their proof directly with levying war in person? How can he suppose from this indictment that they mean to make it appear that other persons levied the war, and that he was more than one hundred miles off?

If the indictment charged, what is true, that he was not with the actors, that he was at a great distance, but that he advised or persuaded them to act, then he would not be obliged to be tried till the principal should have been convicted. Does not this furnish a decisive argument to prove that the indictment must specially show that the accused is charged as an accessory when the evidence is intended to prove it? Before the conviction of the principal, the accessory cannot be put on his trial, except together with the principal, in which case the jury are expressly to be directed, that if they do not find the principal (the person charged with levying the war) guilty, they are not to inquire into the conduct of the person who advised

the levying of the war, but to acquit him of course; since his guilt, being only derivative in its nature, cannot exist if the principal on whose guilt it would be founded be innocent. How else could he object to a trial? It would be impossible for the accessorial agent to make any objection to a trial, though the principal had not been convicted, unless it were specially stated in the indictment that he was charged as an accessory. This is full and explicit to show why in treason an *overt act* is laid in the indictment: that the party charged may know what he is charged with.

I ask, How could Colonel Burr, charged with treason on Blannerhassett's Island, know the specific act meant to be proved against him? that he was meant to be charged with some act done there when he was two hundred miles off? that he was considered as having advised that act? and that this was the offence he was to answer for? But gentlemen say that a specification is unnecessary because we know what the charge is against Colonel Burr. The law presumes that every person is innocent till the contrary appear; that the party charged has no knowledge at all of what is not specified; and consequently that any man who means to disprove that innocence should make a clear and distinct charge against him.

Gentlemen say that he must know the charge, because he has summoned thirty or forty men to give testimony in his favor. We saw that we were charged with treason on Blannerhassett's Island; and we have summoned these witnesses to prove that we were not there, and to contradict the evidence of certain witnesses summoned against us. I might say, to prove the character of that all-important witness who endeavored to excite an insurrection of the negroes. Of this, however, the proof is rendered unnecessary by his precipitate flight.

As they have charged that we were on the island, and laid there what they deem an *overt act* of levying war, we could not but conclude that they meant to prove it. We could not conjecture that they meant to prove, not that we were on the island, but that others were there, and to connect us with them. Hawkins, Hale, and Foster all declare the reason why an overt act must be stated: that the accused may know how to defend himself against it

The constitution and laws have provided that persons accused of crimes shall be tried in the state and district where they were committed ; and that a copy of the indictment should be given to the accused a certain number of days before his trial, in order that he might be prepared to make his defence. If, when the party accused comes to be tried, evidence proving a different charge from that which is stated in the indictment of which he had a copy were to be admitted against him, would it not be a mockery of the constitution and a denial of justice ? It would ; because though the *form* were complied with by delivering him a copy, it would give him no notice of what was to be proved against him.

But the gentleman who spoke last says that an indictment stands supported where there is a much greater variance between it and the evidence than is between the indictment and testimony in the case before the court. He says that an indictment against A, B, and C, for murdering D, and charging that A gave the mortal blow, and that B and C aided and assisted, will be supported by evidence proving that B gave the mortal blow, and that the other two aided and assisted. Is this an analogous case ? Is it not clear that in that case all are indicted for the murder ? The specific charge is, that they were all together on the spot and killed D ; and A comes to trial for murdering the man with the other. Has he not complete information from the indictment, to bring his evidence to show, if heard, that the man either was not murdered at all, or not by his participation ? It would be immaterial whether he struck the blow, and inflicted the mortal wound himself, or aided and encouraged the other two to murder him. He may be prepared on the trial to prove that he was not present, or that he was not the man who struck the blow, and that he neither aided nor assisted in the murder. Had the indictment stated the fact as it happened, that one of the other two actually struck the blow, and that he only aided and assisted, it would have given him no useful information. To state which of them gave the blow is totally immaterial ; the blow of one is the blow of all. They are all equally guilty ; and from the explicit charge against them, they all come fully prepared to defend themselves.

The gentleman then referred to 9 *Coke*, 119, where a person was charged with being an accessory to two, and the proof being that he was only an accessory to one of them, was held to be sufficient to support the indictment. What benefit can the gentleman derive from that case? It does not apply to this case; and it may be doubted whether it be law, though approved of by *Foster*, 361. He states that "as the law now standeth, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him." But he admits that the doctrine was anciently otherwise, and that "if a man had been indicted as accessory *on the same felony* to several persons, he could not have been arraigned till all the principals were convicted and attainted." But the case in Coke does not apply. What was the ground of accusation in that case? The party accused was indicted for having advised B and C to murder D; and on the trial it was only proved that he advised one of them to kill him. But he was guilty of having occasioned the death of D by advising one as much as if he had advised more to kill him. He is charged with having advised B and C to commit the act. It turns out in evidence that he only advised one of them. The substance of the charge is that he advised the killing of the man; and the man is killed pursuant to the advice. It is totally immaterial whether one or two killed him, as he was killed according to the advice. If he counselled B to do the act, and B did kill him, is he not equally as guilty as if he had advised others to do the act. Does he not know, when he comes to defend himself, that it is in consequence of having counselled the death of the deceased? He cannot be surprised. He is fully apprised of the charge intended to be proved on him; and they must prove him guilty of having advised the murder of the man who is killed before he can be convicted. I ask whether the indictment do not in that case show the fact with sufficient certainty. When a man is charged with being an accessory before the fact to two persons, and he is found guilty of being accessory to one, he shall be punished; but if he be acquitted of being accessory to one, he shall not be discharged; but according to 1 *Hale*, 624 (confirmed by Fos-

ter in the page last cited), he shall be tried *de novo*. "If A, B, and C be indicted as principals, and D is indicted as accessory to them all, D *shall not be arraigned till all the principals be attaint or outlawed;* for if A and B be tried and acquit or attaint, yet D may be accessory to C, and not to A nor B. But if A, B, and C be indicted as principals, and D indicted as accessory to A only, there if A be attaint, though B and C be not, yet D shall be arraigned."

"But yet the court may, if it please, arraign the accessory in the first case; for if he be found accessory, he shall have judgment, but if acquitted of being accessory to A, yet that acquittal dischargeth him not of being accessory to B or C; and therefore when they come in and plead, and are attaint, D may be arraigned *de novo* as accessory to B and C. So that it is in the discretion of the court to arraign him or not, before B and C be attaint, though it be the safer course to respite the arraignment of the accessory till all appear or are outlawed."

In these cases, where a person is charged as being accessory to several, an acquittal of being accessory to some of them does not discharge him as accessory to the others. But it is otherwise in the case of an appeal, in which the appellant was obliged by the common law to prove the defendant accessory to all the principals, *in manner as he had counted against him.* This distinction is laid down in 2 *Hale*, 201. "Nota, the diversity seems to be between an accessory to two principals in an appeal; there he shall not be convict if he be only accessory to one. But if A and B be indicted as principals, and C be indicted as accessory to both, if he be found accessory to one, he shall be convicted, because at the king's suit. Thus, if an appeal had been brought forward by the widow of the person killed against several principals, and another person as accessory, if she did not prove that he was accessory to all the principals, he could not be convicted. I ask, How came the rule of evidence with respect to accessories in appeals not to be the rule as to all accessories whatsoever? Why this diversity between indictments and appeals? It was adopted to gratify the vengeance of the king. The rigor which required, in appeals, proof that the party charged as acces-

sory was accessory to all the principals as stated in the appeal, was not permitted to extend to cases wherein the crown was concerned. In 9 *Coke's Reports*, 119, this doctrine is explained in the case of the Lord Sanchor. He was prosecuted as an accessory for having procured and incited Robert Carliel to kill John Turner; but James Irweng aided and assisted Robert Carliel to commit the murder; but there was no direct proof that James Irweng was procured by the Lord Sanchor to commit the murder. Robert Carliel fled out of the kingdom; but Lord Sanchor surrendered himself. As Carliel was not taken or convicted, it was legally impossible to try and convict the Lord Sanchor, who was but an accessory. It was doubted how the Lord Sanchor, being an ancient baron of Scotland, could be tried, and in what court he should be tried after the principal should have been attainted. The king consulted the two justices and chief baron on these points, who answered, first, that as Lord Sanchor was but an accessory, he could not be convicted before the principal was attainted; second, that Lord Sanchor, not being a peer of the realm, must be tried by the Commons; third, that forasmuch as the procurement was in Middlesex, it was most convenient to try him in the King's Bench. The chief justices conferred with the other justices of the King's Bench before whom he should be tried. And thereupon divers questions were moved concerning the legal proceedings in this case. Among other points determined by the judges, "it was resolved, that forasmuch as there was not any direct proof that *James Irweng* was commanded or procured by the Lord Sanchor to commit the murder, but that he associated himself to Robert Carliel, who was procured by him, that the best way is to indict the *Lord Sanchor* as accessory to Robert Carliel only; for indictments which concern the life of men ought to be framed as near the truth as may be; *et eo potius*, because they are to be found by the oath of the grand inquest; which finding is called *veredictum, quasi dictum veritatis*."

Thus far the opinion of the judges may be admitted to be correct, though the questions were not perhaps regularly before them; but they went further, and determined a point which was certainly not judicially before them:

"and yet it was resolved, that if one is indicted as accessory to two, and he is found accessory to one, the verdict is good." They were of opinion that every indictment concerning life ought to be drawn as near the truth as might be, for this reason: that the accused may know, in the clearest and most satisfactory manner, what is charged against him. Every indictment ought equally to state facts: but particularly those affecting life ought to be as correct and as near the truth as possible. But the opinion here given was not judicial. If judges assemble together and state the law on a point not before them, it is a mere extrajudicial opinion. They determined here that it was the best way to indict the Lord Sanchor as an accessory to *Robert Carliel* only. It was a fact that he was accessory to him only; for there was no positive evidence that he was accessory to *James Irweng;* and the law was settled correctly as to him. As to the man to whom he was an accessory, there was no such question arising before them. If a man were indicted as an accessory to two, and found to be an accessory but to one, would it be sufficient to maintain the indictment? would it prove the crime alleged against him? By having introduced such a principle, it may be insisted that if a man were charged as an accessory to six, he might be acquitted five times, but found guilty and punished the sixth time; a doctrine utterly repugnant to the spirit of the law and the principles of justice and humanity. But Foster, treating on the subject, quotes the words of Hale: "that it is safer to respite the arraignment of the accessory till all appear or are outlawed." Yet in that case Foster seems to be far from considering this distinction between accessories in an appeal of death and in an indictment, as being what it ought to be; at least, he uses no argument, and gives no decisive opinion upon it. He merely quotes Hale as citing the before-mentioned authority in 9 *Coke*, 119, without any comment; and the case in Coke does not warrant the doctrine for which they contend; on the contrary, when rightly considered, it is in our favor, and cannot benefit the prosecution. But gentlemen have said that an indictment in treason is not strictly confined to the precise time or place laid. As to the time it is not material. The day laid in the indictment is never re-

quired to be proved. If the accused have committed the offence before the day of finding the indictment, the *day* is perfectly immaterial; because the indictment gives notice *which* offence they mean to prove; whether committed on the day stated or not, is an inquiry of no importance; that the offence had been committed is the charge. For instance, gentlemen are not bound to prove the offence on the day on which the indictment charges it to have been committed: "the 10th of December, 1806. On Blannerhassett's Island" — but it gives notice of treason committed *there;* and they must be prepared to prove it committed there. The gentleman says that the *place* is not material. I acknowledge that the party who brings forward the accusation is not bound to *specificate the spot* in the county. If he charge the offence within the county, it will suffice. If the accused have done anything that may be construed into an act of levying war, it can only be proved *where* laid. But the gentleman says that they have a right to go into the whole county of Wood, and prove the crime committed anywhere there. We might admit it; but the admission would avail them nothing. Even on that ground there is not a word proved that we were there. But when an act is located, it must be proved *where*, as stated. Reason requires that it should be proved where the charge has given notice of its having been done. Authorities also support it; and gentlemen must be bound by authority and common sense. But though the prosecutor is not bound to specify the particular spot where a crime has been committed, yet if he do fix the spot, he must be bound by it. Particular expressions in an indictment may make the place very material, when otherwise it might not be so.

2 *Hawk.* chap. 46, sec. 34, is conclusive on this point: "Thirdly, that where a certain place is made part of the description of the fact, which is charged against the defendant, the least variance as to such place between the evidence and indictment is fatal; as where a trespass in taking away goods, or any other offence, is alleged in such a parish in the house of J. S., or in such a parish in a play-house in Lincoln's Inn Fields; and upon evidence it appears to have been done in the house of a different

person, or that there is no play-house in Lincoln's Inn Fields. But it is a settled rule that a place laid only for *venue* in an indictment or appeal, is no way material upon evidence; but that a proof of the same crime, at any other place *in the same county*, maintains the indictment or appeal, as well as if it had been proved in the very same place."

You may lay the offence in any parish in a county; you may prove it in a different parish, but within the county. But if you fix on a spot, and describe the offence as committed in that particular place, if there be no such place, or if the evidence will not prove the act committed at that place, the prosecution must fail. It is true that if the place were laid as a venue, it would not be material, provided it were proved to be anywhere within the limits of the county. But Blannerhassett's Island is not laid as the venue, but is made a part of the description of the fact charged against the accused. The venue is the county of Wood, within which the offence was committed. When the crime is laid at Blannerhassett's Island, gentlemen have made it material by giving it locality; and as they have given it this locality, they are bound to prove it as laid. The decision in 2 *Salkeld's Reports*, 651, proves that where an action is local, it must be laid and proved accordingly; and that if a person give a locality to an act, though he needed not to have done it, yet he must prove it accordingly. You will recollect that the same principle is stated in *Gilbert's Law of Evidence:* that when a party has given locality to any act, he must prove it as laid, though he needed not to have laid it so. The same principle is also laid down in *Eden's Penal Laws*, 317.

In Fries's trial before Judge Iredell, the same principle has also been sanctioned. The indictment laid the overt act at *Bethlehem*, in the county of *Northampton*. In the charge or instruction of Judge Iredell to the jury, he says that the prosecutor, by laying the overt act in the town of *Bethlehem*, instead of the county of *Northampton* at large, was bound to prove the act at *Bethlehem*, or that the prisoner must be acquitted. Several passages in his charge, in *Fries's Trial*, 171, prove this: "Gentlemen," said he to the jury, "*if you are not well satisfied*

that the overt act of treason was committed at Bethlehem, and that that overt act is supported by the evidence of two witnesses at least, you will not find the prisoner guilty." Again he says, "As I before observed, there must be two at least to prove *that the act of treason was committed at Bethlehem.*" The same conclusion cannot but be inferred from another part of his charge, page 175: "Again, if no evidence could regularly be admitted out of the county, until both the fact and intention were established where the fact is laid, the consequence would be, that there ought to be some way of taking the opinion of the jury, *whether they believed that the crime was committed at Bethlehem*, before the court could proceed to extraneous testimony;" which shows as clearly as the other passages, that, in his opinion, *the overt act must be proved to have been committed at Bethlehem*, the place laid in the indictment.

I presume these authorities will at least excite some doubt in the gentleman's mind that he may be mistaken. If he be not so, then we must only be prepared for what they can prove to have been done in the county of Wood at large instead of the island, to which the indictment confines the levying of the war. But if other people were there and levied war, and you make us answerable for their conduct on the ground that it was by our advice and encouragement, without stating it, you tell us in effect, "We make you responsible without giving you any notice."

But gentlemen say that the indictment does not charge Colonel Burr with being on the island, and therefore it need not be proved. If the indictment say that he levied war on the island, does it not necessarily allege that he was there? When it charges that he committed an overt act there, is it not the legal and fair inference, that he was at the place when he committed it? When a party is said to have done any act at any place, is it not naturally understood that he was at the place where he is thus said to have committed the act?

But the gentleman says that he has authority to show that he may be charged as present, though not there; and he cites in support of the assertion 1 *Hale*, 214, 238, and 1 *East*, 127. Let us see whether anything in *Hale* justify it. In page 214, his words are, "But if

many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all ; and they may be all indicted for counterfeiting generally within this statute ; for in such case in treason all are principals." We must consider only as much of the precedents as from the reason of the case applies to the subject now in discussion. Now, Hale has not said that those persons, who, having conspired to counterfeit, become traitors by one of them having done the fact, upon that conspiracy, were not present. He says nothing of their being present or absent ; but that if several conspire, and only some of them act in pursuance of that conspiracy, they are all equally guilty ; that if two conspire to counterfeit the coin, and one do it according to the intention of that conspiracy, they are both equally guilty of treason. It is the nature of a conspiracy, that what two conspire to do may be done by one, whether the other be absent or present. Hale says nothing as to their being together ; or whether an absentee, or a person who only advises, can be charged as present and an actor. He leaves these questions just where they were, unexamined and undecided. If two persons conspire together for any unlawful purpose, as to write a letter to cheat a third person, and one of them write the letter, the other, being present, is considered as a conspirator, and as criminal as the writer of the letter ; and they are indicted as joint conspirators. So in coining money : if two have joined in a conspiracy to counterfeit, and a part of the conspiracy be, that one shall act upon that conspiracy, and he doth counterfeit or coin false money accordingly, they are equally guilty ; and the act of one is thus the act of the other under the law against coining false money in England. But he does not say that the party were absent. He refers to no authority. It is a mere inference, and can have no influence on this case. It can have no influence on accessorial agency.

Here, though it does not strictly apply to this branch of my argument, I may draw a conclusion from the authority adduced by themselves which operates against them. In this very page he had just said before, that "*there must be an actual counterfeiting ;* for a compass-

ing, conspiracy, or attempt to counterfeit is not treason within this statute without an actual counterfeiting." On the same principle, if the doctrine be applied to levying war, *there must be an actual levying of war;* and a conspiracy or attempt to levy war is not treason within the words and meaning of the constitution. So much for page 214.

Let us now turn to page 238, and see whether it can furnish any justification of the gentleman's argument: "Though the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet thus much he partakes of an accessory, that his indictment must be special of the receipt, and not generally that he did the thing (which authority we have repeatedly urged against them), which may be otherwise in case of one that is a procurer, counsellor, or consenter. Thus it was done in Conyer's case, *Dyer*, 296."

This authority he relies on to show that a procurer or an accessory before the fact need not be specially charged; that he may be indicted generally, that he levied the war. The words "*which may be otherwise in* the case of one that is a procurer," &c., are depended on. So it may be otherwise in that species of treason compassing the king's death. I have no doubt that in that species of treason, any degree of accessorial agency before the fact, as counselling another person, writing a letter, &c., would be construed an overt act of compassing the death; and therefore the accessory before the fact might be indicted generally for having compassed the death of the king. But it would not be so in the case of levying war or any other treason. If he mean anything else, there is not a shadow of authority for it. He cites a case in *Dyer* which does not justify the construction for which the gentleman contends. That case only shows that a receiver of a false coiner was indicted specially for the receipt; and it was deemed a misdemeanor. That was an indictment for receiving a coiner, knowing him to have counterfeited or coined false money; and it specified the receiving him particularly; but judgment was not rendered against him, because it was judged to be only a misdemeanor. It states nothing as to the manner in which an accessory before the fact ought to be indicted; but it may

fairly be inferred from it, that he ought to be charged specially; as the indictment in that case was special. 1 *East*, 127, merely refers to those passages of Hale which have been just commented on, but does not explain them; but he fully explains himself in pages 100, 101, of the same volume; which, though already referred to, I beg leave again to read: "In regard to all acts of approbation, incitement, advice, or procuring to that species of treason, compassing the king's death," &c., there is no doubt that the party may be tried before the person who acted upon such incitement; because the bare advising or encouraging to such actions is in itself a complete overt act of compassing; and it is totally immaterial whether the attempt were ever made or not. The case of Sommerville proves no more than this (though the rule is there laid down in general terms), that a person aiding or procuring a treason may be tried before the actor. But with regard to all other treasons within the 25 Ed. III., if one advise or encourage another to commit them, or furnish him means for that purpose, in consequence whereof the fact is committed, the adviser will indeed be a principal; for such advice or assistance would have made him an accessory before the fact in felony; but if the other forbore to commit the act thus advised, the adviser could not be a traitor merely on account of his ineffectual advice and encouragement, though his conduct would be highly criminal; for it cannot be said that a person procured an offence which in truth never was committed. In these cases, therefore, *the treason is of a derivative nature*, and depends entirely upon the question whether the agent have or have not been guilty of such treason, *the proof of which can only be legally established by his conviction, if he continue amenable to justice, or his attainder by outlawry if he abscond;* unless the accessory choose to waive the benefit of the law, and submit to a trial."

Here East explains himself where he means that a man may be indicted generally, and shows that where a party is to be considered in an accessorial point of view, he cannot be brought to trial, except by his own choice, until the principal be convicted or outlawed. Here those persons who advised or procured a treason before, are placed

on the same footing with those who receive a traitor after the fact. But any act of an accessorial nature may be a complete overt act of that species of treason which comes within that clause of the statute which is against compassing the death of the king, queen, &c. This is the most comprehensive treason, the most easily prosecuted, and the most liable to be abused for the purpose of tyranny and oppression. As Aaron's rod swallowed all other rods, so this treason for compassing the king's death swallows all other treasons.

2 *Hale*, 223 (which see before), shows that though in high treason all are to be considered as principals, yet accessories before and after the fact (who are both put on the same footing) are to be proceeded against only as accessorial agents; that the accessory shall not be put to answer of the receipt or *procurement* till the principal be outlawed (or attainted, &c.).

But the gentleman has said, that agreeably to our constitution, they could not charge the accused otherwise than as they have done; that they must have charged him with levying war. I cannot see any difficulty in charging him according to the truth of the case. But however criminal or injurious his conduct may be, and however much he may deserve punishment, he ought not to be deprived of the benefit of law, or to be considered as guilty of treason without legal proof of his having committed an overt act of levying war, or to be condemned unheard to subserve unworthy party purposes. If advising a man to levy war be treason, and punishable under the constitution in the same manner as actually levying war, I ask, Why should not the indictment be so drawn as to correspond with the evidence, and give full notice to the accused of the charge intended to be proved against him? I ask, Why was not the indictment in this case so drawn as to embrace the real facts? Why did it not state that A, B, and C (meaning those on the island) did levy war against the United States, and that Colonel Burr did advise, incite, encourage, and counsel them to levy it?

This would have been an overt act if the indictment had stated that he had counselled war to be levied, and that war was levied pursuant to the advice, instead of

charging him generally with levying war. It would in that case have stated everything specifically, whereby he would have been informed in what manner to defend himself. If, then, they could adduce legal proof that he had given such advice, and that acts were performed amounting in legal construction to levying war, the testimony would correspond with the accusation, and the accused, instead of being surprised, would be prepared to defend himself. I see no kind of difficulty in drawing such an indictment, provided gentlemen had proof to support it according to the true construction of the constitution and principles of law.

But there was one allegation of the gentleman, that a party advising a trespass ought to be charged as having committed it.

The gentleman who opened the case proved that this idea is unfounded; that he who assents to a trespass, who commands it to be done, or receives the trespasser, cannot be charged for such an act, except in case of a trespass committed on lands. 2 *Hawkins*, chap. 29, sec. 4, read by that gentleman, sufficiently explains this: "It seems agreed that whosoever agrees to a trespass on lands (or goods done to his use) thereby becomes a principal in it; but *that no one can become a principal in a trespass on the person of a man by any such agreement.*" He goes on to state that no one can be adjudged a principal in a *common* trespass for knowingly receiving or comforting the offender, though his concealment prevents the execution of a warrant issued against him; and that as he cannot be punished as a principal, he cannot as an accessory; for all who are implicated in such inferior offences are principals.

This authority is conclusive; but if the law were otherwise, and the gentleman's idea correct, how could it affect the case now before the court? Would it prove that those who have commanded or advised treason could be tried before the principal had been convicted? Even then, on the grounds of correct analogy, those who actually committed the trespass must be tried before the persons who advised them to do so. And where life is at stake, the necessity is clear and manifest, that the accessory should not be tried before the principal. Even Leach

(whose edition of *Hawkins* is referred to), in his note heretofore read to your honors, subscribes to the doctrine of Hale and Foster. He states that the accessorial offence is of a derivative kind; that some *act* must be done to which the offender must be accessory; that though he is to be considered as a principal, "yet in his progress towards conviction he ought, from a principle of natural justice, to be considered merely as in the nature of an accessory before or after the fact; because if he were tried before the person who actually did the fact, the absurdity might follow, that the accessorial agent may be convicted, while the principal may be acquitted. I have taken pains to look at nearly all the authorities, and intended to have gone through all the cases to *prevent* the inference from being made, that an accessorial agent should be tried before the person who did the act, and to show that the indictment against every accessory must specially state him to be such; but as so much time has been already consumed on those points, I think it necessary to refer only to one or two more cases: and first I refer to *Vaughan's Reports*, 115; the case of *Bago de Clare*, cited in the case of Henry Stiles, plaintiff, *v.* Richard Coxe, baronet, and four others; and which is conclusive to show the universality of the principle, that the conviction of the actor must precede that of the adviser or procurer; and of the rule, that the adviser or other accessory must be specially charged. This cited case shows that the adviser or procurer of a trespass cannot be convicted till the actor shall have been convicted; that he must be specially charged in the indictment; and that there is no distinction in this respect between the cases of treason and felony, and the case of a trespass. It is reported in the words following: "But as to that, the ancient law was both adjudged in Parliament and allowed, that it was *contra consuetudinem regni*, that a man should be condemned in a trespass *de precepto* or *auxilio, if no man were convicted of the fact done.*

It was the case in Parliament of *Bago de Clare*, 18 *Ed. I. John Wallis*, clerk, entered his house and brought letters of citation from the archbishop of *Canterbury*. Some of the family of *Bago* made *Wallis* eat the said process and wax thereto affixed, *et imprisonaverunt et male tracta-*

verunt; for which and the contempt to the king, he brought his action against *Bago;* who pleaded that he named no person in certain, nor alleged that the fact was done by his command, and demanded judgment thereupon, and was discharged.

Notwithstanding by the king's pleasure, for so enormous a trespass done in contempt of the church, for the contempt done within the verge and in time of Parliament, and for the bad example, *Bago* was commanded to answer the king of the trespass done in his house *et per manupastos et familiares suos;* and a day was given him to produce, before the king and his counsel, those of his family; which was accordingly done; but they who were said to have done the fact were fled; and he pleaded in substance (in the report at full length in Latin) "that he was not bound to answer to the suit of the king till the principal actors (*factores principales*) were convicted;" and judgment was given to this effect: "that he was not bound to answer to the king till the principal actors were convicted; that at present he should go thereof without day; that Wallis might prosecute those principal actors if he thought proper; and six persons became bail for *Bago* to answer to the king when required *after the principal actors should have been convicted: cum prædicti factores de facto illo fuerint convicti.*"

A judgment in Parliament at the king's suit, that it was "against the custom and law of the kingdom to convict a man *de precepto auxilio aut missione* in a trespass, before some who did the principal trespass were convicted. And the reason of the law is very pressing; for else a man may be found culpable of aiding or precepting a trespass to be done; when the doers of the trespass are acquitted, and not culpable: which is to be culpable of aiding the doing of a thing never done; which is impossible." After showing that the law was still unaltered, he adds, "However, letting that case pass, but as the law is now taken, no man can be guilty of aid or assistance to a trespass not done; and, which is the same, whereof the actors are acquitted."

This is certainly a case completely in point. Here *Bago*, the accessory, the adviser or procurer, was discharged in the civil suit, and acquitted at the suit of the king, because the person or persons who had committed

the trespass had not been tried ; and it was possible they might be found to be innocent ; in which case it would be absurd to punish *Bago* for being accessory to an act never committed at all.

The case reported in 1 *Levinz*, 124, does not operate against us ; it is different from the case of Bago ; and it is decisive in our favor to show the necessity of a specification against the adviser or procurer of a trespass. The case was this : Sir John Jackson had compelled or induced certain witnesses to swear falsely in his favor in a particular case. The man who had lost the cause (Primate), by way of punishing the rascals, caused the witnesses who had sworn falsely to be indicted for perjury. When the indictment for perjury came to be tried, Sir John Jackson, who had gained the cause by their perjury, commanded his servants to beat and imprison the witnesses who were to prove the perjury ; whereupon, by this confinement and absence of the witnesses, the parties indicted were acquitted of the perjury. A motion was made for a new trial in the case of the indictment for perjury, which was denied, because it was a criminal case ; and a party once acquitted in such a case shall never be tried again. But the court ordered an information to be filed against Jackson for having directed his servants to beat and imprison those witnesses ; which was done ; and he was found guilty of the charge stated in the information. It was moved, in arrest of judgment, that the information was against Jackson for procuring A and B (his servants) to beat and imprison the witnesses, and that Jackson alone was tried and convicted ; but that the two servants were not tried or convicted ; that it was not certain therefore that they were guilty of the battery and imprisonment ; and then Jackson could not be guilty of procuring that which did not appear to exist. But it was resolved by the court that the master, in commanding the servants to commit the battery and imprisonment, was a principal, and not an accessory ; and that, being found guilty by the jury, he must be presumed to have committed the fact (and possibly he might have been near enough to render them aid if necessary) ; and they imposed a fine on him, and compelled him to find security for his good behavior for a year.

But the information was special, charging Jackson with commanding and procuring his two servants to beat and imprison the men. It shows that the servants beat the men by their master's orders. It gives explicit notice of the charge which was to be proved against him ; so that he was ready and knew how to defend himself ; he could not be surprised.

But suppose he had been indicted as having himself beaten and imprisoned the men ; must not the charge have been proved in court as set forth in the indictment ? This case in Levinz is a strong authority to show that, in indictments of this kind, the facts must be stated according to the truth of the case ; and that, according to the law of England, indictments must be special to show accessorial agency.

I hope, may it please your honors, that however desultory my observations may have been, I have proved the first point which I proposed to establish : that the acts charged, if proved to be committed, did not amount to levying war. And in the course of my argument I think I must have satisfied you on the third point (necessarily connected with the first), so far as to show that the charge in the indictment *ought* to have been special ; and if it *ought*, evidence of accessorial agency cannot be received to support this indictment charging the accused as a principal actor. I shall, therefore, proceed to inquire into the nature of the evidence necessary to the conviction of Colonel Burr, and in the second place shall insist on the necessity of proving the previous conviction of those persons who committed the act on Blannerhassett's Island ; and that this can be only done by the production of the record of their conviction. Here let me beg the gentlemen on the other side not to charge us with the cruelty of wishing to criminate Mr. Blannerhassett in order to save our client, as they have repeatedly and unjustly done. When we avail ourselves of the rule of law which requires the conviction of the principal before that of the accessory, and therefore say that the conviction of Mr. Blannerhassett must be legally proved before Colonel Burr can be affected, we do not admit that any treason has been committed. We say that treason was committed by no person ; and that whether they charge

Blannerhassett, Jonathan Dayton, John Smith, Israel Smith, or any other person or persons as the actor or actors on the island, we are equally far from admitting that any treason has been committed by any of them. But if they insist that treason has been committed, they must indict and convict in the first instance those who did the facts, before they can rightly proceed against the accused for having commanded or advised those facts. When they charge a person with accessorial agency, there is no difference between commanding and receiving. With respect to the first, an accessory before the fact, prosecuted for having procured, commanded, or advised the conviction of the principal, is a prerequisite; and the best evidence of that conviction is the record which shows it; and on the trial of the accessory the first evidence to be produced must be the *record* of the conviction of the principal.

Gentlemen say that we have insisted that the accessory ought not to be brought to trial till the principal were convicted; but that there is a case where it is not necessary to produce this record. We *did not mean* to deny one exception from this general rule: that they may be tried together. We admit that the position was laid down in terms rather too broad; because if the principal and accessory were indicted in the same indictment together, the accessorial agent could not be found guilty till the guilt of the principal were found. In that case the record of the conviction would not be necessary, because it could not exist. The indictment in such case would specify distinct charges against both, according to the real facts; which would enable each of them to be prepared for trial. But the court would direct the jury: "Gentlemen, you are first to decide whether the principal charged with having done the acts be guilty or not. If you do not find him guilty, you are to make no inquiry as to the accessorial agent (whose guilt is connected with and founded alone on that of the principal), but to find him not guilty, and discharge him of course; but if you find the principal guilty, you are then to inquire into the conduct of the accessory." But gentlemen, unable to controvert this correct doctrine, endeavor to avoid it, and say that Colonel Burr might have declined a trial till some of the actors

who were on the island had been convicted. They ask us, Why did not Colonel Burr refuse to come to trial? and urge that by submitting to a trial he has waived the benefit of every objection which he might have been entitled to make. That they should have mentioned Blannerhassett in terms of compassion and regret may be accounted for; they may have policy for doing so. For some think that the public indignation ought only to be excited against Colonel Burr, in order to press him down as much as possible. This indirect seems to be a favorite mode of attacking the accused. But Colonel Burr could not resist a trial. The prosecutor has thought proper to charge him as having levied war in person, as a principal actor; and being thus indicted, he could not avoid it. He could make no specific objection. He could only meet the accusation by the general defence of Not Guilty.

It is admitted that if Colonel Burr had been charged as an accessorial agent, and had thought proper to submit and consented to be tried, he would have been precluded from making any objection afterwards. But this of itself proves the necessity of stating accessorial agency in the indictment. Colonel Burr is not charged as an accessorial agent, but as an actor; that he has levied war on Blannerhassett's Island with other persons unknown. As the indictment stated that he himself had committed the treason and levied the war, he could not know that he was intended to be charged as an accessorial agent, or that any evidence to prove him to be such would be introduced against him. Colonel Burr, therefore, being indicted as a principal traitor and actor, had no choice but to put himself on his trial as such, and plead that he was not guilty. Antecedently to the exhibition of the indictment, he could not know the charge against him. Till he had seen it, it was impossible for him to form his defence. When he sees it, it informs him that he is accused of having levied war himself on Blannerhassett's Island; and to this charge he could not, from the nature of things, make any other defence, than to deny that he was guilty. Yet so far are they from attempting to prove that he was on the spot himself when the acts charged were committed, that they have given that matter up entirely, and admit that he was some hundreds of miles off. If the

accused were duly notified, by a special charge in the indictment, then they must prove accessorial agency only; and this they could not do without bringing the principal to trial with him at the same time, unless he thought proper to waive the right of objection, which would then be obvious. He might have availed himself of the law (as stated in 2 *Hale*, 223, quoted before). He would have a right to say, As you have not indicted the principal and accessory together, but have charged me alone as accessorial agent, you cannot go on to try this indictment against me without producing that evidence which proves the guilt of some principal. I now avail myself of the objection.

It is the first time I have had it in my power to urge it; and without your establishing the guilt of some principal actor, by producing the record of his conviction, I will not consent to be tried. If, on the other hand, with the objection obvious to his view, he thought proper voluntarily and deliberately to waive it, and consent to be tried, he would have been precluded from availing himself of it thereafter. But nothing could deprive him of the right but this solemn and deliberate waiver on an indictment specially charging him as an accessory before the fact.

Having proved that under this indictment no evidence yet adduced is competent to convict the accused, I shall now make a few observations on one of the questions before your honors. There is one proposition laid down by us which is of the greatest importance, and requires the utmost deliberation. It is this: Admit that the acts on the island were done with an intention to subvert the government of the United States (which I hold must be the motive to render them treasonable; for no person will controvert this position, that the acts of levying war, in order to be treasonable, must have been done with this design), yet there was no act of war, no violence done; there was no overt act of levying war, no treason committed.

It involves a most important question: whether the most peaceable acts, acts innocent in their nature, though done with a design of subverting the government of the United States, can be considered as acts of levying war against the United States. The question is, whether

violence be not necessary; whether some act of force must not be used to constitute a levying of war. We insist that no evidence can support an indictment for levying war without some act of violence.

What is a levying of war? Why, gentlemen say that levying war is levying war — "*lever la guerre*" — levying soldiers — that it consists in preparing the means of war.

I should rather suppose that the framers of our constitution, who proceeded with so much caution, and endeavored in every part of that instrument to secure the rights and liberties of their fellow-citizens, and especially a speedy trial by an impartial jury of the district, did not intend, by the terms "levying war," an unnatural and dangerous construction, unknown in common parlance and unusual in history or judicial proceedings. They could not have contemplated an extension of the doctrine of constructive treason, which has been always held so peculiarly hostile to civil liberty. They never could have intended that acts peaceable or innocent in themselves should constitute treason.

If by "levying war" they meant enlisting of troops or raising an army, they would have said so in plain terms. They would have said that "treason against the United States shall consist in enlisting or levying troops, or raising an army with intention to make war against them."

If levying troops, embodying men, or enlisting soldiers with intention to subvert the government of the United States, were intended as sufficient to constitute treason, why did not the framers of the constitution say so? Why did they not say that levying of troops or raising an army had the same idea or meant the same thing as levying of war.

In a constitution devised by men distinguished as much for their devotion to the public good as eminent by their talents, nothing unfavorable to liberty would have been intended. Precision of language must also have been attended to. Nothing, therefore, can justify the construction which gentlemen advocate but unavoidable necessity. But it is as unnecessary as it is dangerous. If they had intended that merely to enlist men, to raise and embody troops, to raise an army without anything more, should

constitute treason, they would have expressed it in such plain terms as to defy misconstruction. Levying of war implies force of some kind. The idea of violence of some kind is inseparable from that of war.

But, sir, raising an army or levying troops is only a preparatory step towards levying war. You levy troops in preparation, in intention to levy war. But no act preparatory to levying war can be an actual levying of war. What is the technical meaning of "levying." Whether derived from the French word "*lever*," or the Latin word "*levare*," to *raise* (or as applied to war, to *make*), to *levy war* is to make it, according to its popular acceptation, as well as its meaning as used by some of the best writers. The meaning or true construction of both expressions, "*to levy war*" and "*to make war*," is precisely the same. Whatever is making war is levying it.

But says the gentleman, "Levying war and making war are different things; an overt act of levying war and an overt act of war are not the same; the King of England can levy war, but his troops make the war; that he levies, but his officers and soldiers fight the battles and make it." I did not know before, that, in the United States, levying or raising troops was the same thing as levying war. Troops are often raised. One hundred thousand men have been authorized to be called out; but I did not know that we were levying war, however desirous some individuals may be that it were so. But gentlemen say that it is a common expression that the king levies war; and his officers and soldiers actually make it. Why is it said that the king levies war? It is a very uncouth expression; but he is said to levy war, because he represents the nation. It is the nation in its national character that really makes war; and he is the person who is at the head of the nation; of which nation the officers and soldiers are only the constituent parts. He is said to levy war, because he is the representative of the nation in its national capacity. The United States also make war in their national capacity. They are composed of individuals of whom the officers and soldiers, like the people of other countries, actually fight battles. It may as well be said that if I, Luther Martin, knock a man down with my hand, I do not knock him down, but *my*

hand does, because my hand is a constituent part of my body.

But there is no such distinction as gentlemen contend for, between the king and his officers and soldiers. There is no such distinction as that the king levies and his officers and soldiers make war. One king, as the representative of one nation, makes war on another as the representative of another nation; and thus the one nation makes war on the other. But there is no possible correctness in the distinction contended for. There is none in reason, in the decisions of courts, or in the practice of nations which confines the making of war to those who actually fight battles; and until there shall be some decision establishing such a distinction, and thereby placing our country in a worse situation than the laws of Great Britain have placed that country, I cannot believe it to exist. I shall hold the true definition of levying war to be making war, and for the purpose of subverting the government of the United States. Sir, "making war," *ex vi termini*, implies the use of *force, violence*, soldiers. I appeal to the authorities, both in Great Britain and America, as far as prosecutions for levying war have taken place in this country, whether an act of violence have not always been deemed essential to levying war; and whether the indictments do not specify some act of force or violence.

Even in the constructive treasons of destroying meeting-houses, and pulling down bawdy houses, force or violence must be employed to constitute treason. In all cases of that kind, houses have been violently torn down and destroyed, and many persons greatly injured. In the cases of Messenger, Green, and others, those of Damaree and Purchase, and all other cases of the like kind in England, and that of Fries and other cases in this country, force and violence have been used, and invariably stated; and what is still more decisive, as to the necessity of employing actual force or using violence on such occasions, it was determined by all the judges of England on the former cases, that as to Green and Bedel, the special verdicts were not full enough to judge it treason; because the verdicts only found that these two persons were present, *but neither found any particular act of force*

committed by them, nor that they were aiding and assisting to the rest who did use violence. Force or violence has always been deemed essential to the existence of treasonable war in England ; and I call on the gentlemen to show one instance to the contrary.

Gentlemen have endeavored to distinguish the case of Vaughan from others, as being unaccompanied by force. But that case is irrelevant ; because there was a count in the indictment for adhering to the king's enemies, which was fully supported by his acting under a commission from the French king, and cruising against the subjects of England.

SATURDAY, AUGUST 29, 1807.

Mr. Martin resumed his argument. After recapitulating briefly the substance of what he had said yesterday, he proceeded thus : —

In supporting the positions which I proposed to establish in order to exclude the admission of irrelevant testimony, I contended that to make war was the same as to levy war ; and that the distinction advocated by the attorney for the United States was unfounded. I shall not dwell on that point, because every principle of legal construction and common understanding shows that raising troops is not levying of war. To be guilty of levying war, the accused must be guilty of some overt act, which must be set forth in the indictment ; and which overt act is never stated as a general charge of levying or making war, but as some specific act.

I further stated that actual force was requisite to constitute levying war. The gentlemen on the other side have stated that a great assemblage of men without force would be a levying of war ; that to march in military array was a sufficient act of levying war ; that Colonel Burr, together with a number of persons unknown, thirty or forty, or one hundred (or whatever number of persons you may think proper to suppose), did proceed to levying of war ; that it would be sufficient to say simply that they levied war, without further explanation or specification. To show the absurdity of this argument, I observed that in every indictment for levying of war there must be stated some special overt act of that war,

which the books say is the charge to which the accused must make defence. This construction, we contend, is supported by the common sense that Mr. Randolph was willing to be governed by, but not the common sense of the gentleman on the other side ; and we shall find that every principle of real (and which we say is our) common sense revolts at their interpretation, and renders it necessary that a particular act of levying war should be set forth in the indictment in order to apprise the accused to meet it with his defence. How, then, can a general averment of having levied war be sufficient ?

The charge is, that Colonel Burr levied war. They admit that there must be an assemblage of men for the purpose of levying war. But yet their idea here is, that a man is capable of levying war himself only. A man by his own act solely may be guilty of compassing the king's death ; but was it ever heard or dreamed of by any person in his senses, that a simple individual levied war against a country ?

Mr. Burr. — I do not understand the gentlemen to contend for such a construction ; but to insist that marching in military array, though without arms, would amount to levying of war.

Mr. Martin. — I understood them to insist on that construction. It results from some of their arguments. Is there a single authority to justify such doctrine ? Has it ever been averred that war has been levied by one person ? Admitting that an assemblage is sufficient, then an individual cannot levy war. Suppose that Colonel Burr were indicted, that he, unaided and unassisted by any other person, made war on Blannerhassett's Island against the United States ; such an indictment would be laughed at. There must be others joined in the conspiracy and war. No individual alone can be said to levy war. Would it be sufficient to state in an indictment that the accused went in warlike array from one place of rendezvous to another, and levied war against the United States ? If he levied war, the next inquiry is, *How* did he levy this war ? All the authorities say that there must be laid an overt act of the treason, particularly specifying the manner of its commission.

But it is suggested by one of the gentlemen that Lord

Balmerino's case shows that marching in military array, without any battle, without the employment of force, or any act of violence, constitutes treason; that though an overt act was charged, yet it was said in that case that the general charge of marching with arms in military array would have been sufficient. I did not recollect the case fully yesterday; but I have since looked at it, and find my opinion correct, and that he is mistaken. It does not authorize the conclusion that marching in military array alone amounts to levying of war. Lord Balmerino is charged in the indictment thus: that "he, with a multitude of rebels, armed and arrayed in a hostile and warlike manner, with arms as well offensive as defensive, assembled themselves together, and then and there did falsely and traitorously array themselves, with force and arms, and then and there did levy a public and civil war against," &c.; then the overt act specified in the indictment is this: "that with the said traitors and rebels so armed and arrayed, he did enter into and take possession of the said city and castle of Carlisle, and did falsely and traitorously keep and defend the same against the king's forces."

This was the specific act committed. Gentlemen say that it was a levying of war thus to march into the city in military array. It was certainly an act of making war to enter forcibly into and retain the city of Carlisle against the forces of the king. And though there is a general charge stated before the special overt act, yet there is but one count in the indictment, which is this: that with the said traitors he did, &c. Lord Balmerino's objection was this: that the indictment charged him with being in the city of Carlisle when it surrendered. He was not there then. He only entered it the next day. But he was seen marching armed into the city at the head of his troops, when the rebels were in possession of it; and he held it for the pretender. But the court did not give its sanction to the suggestions of counsel. The court did not decide that merely marching in a warlike array into the city was a sufficient overt act of levying war. Such a decision can be found nowhere. He indeed made two objections: first, that he was indicted by the title of Lord Balmerino of the city of Carlisle,

which he said was no title belonging to him; second, that he was indicted for being at the taking of the city and castle of Carlisle on the 10th of November; whereas he averred that he could prove that he was then twelve miles off.

The lord high steward addressed him thus: "You have made two objections of different natures. The first is to the addition of place given to you in the indictment, and the other goes to the fact thereby charged upon you. As to the first, I must inform your lordship that the words 'late of the city of Carlisle, in the county of Cumberland,' are not made part of your title, but are only an addition of place, which the law for good reasons requires to be inserted by way of description of the defendant in all indictments; and it is most commonly taken from that place where the crime is by such indictment charged to have been committed. As to your other objection, it relates to the fact alleged in the indictment, and will depend upon the evidence, which cannot be entered into until your lordship has pleaded."

[Here Mr. Martin read at considerable length most of the arguments and part of the evidence used on this trial, reported in 9 *State Trials*, 587–615.]

The prisoner said "that none of the witnesses had made good the charge against him, that he was at Carlisle on the 10th of November; and that he had been of opinion that if any article in the indictment was not good against him, all the indictment fell;" "that he thought himself (but was not so advised by counsel), there was something in the objection, or he would not have given so much trouble."

The lord high steward told him, "You say the witnesses have not proved that your lordship was at Carlisle on the particular day laid in the indictment. But they have proved that they saw you in arms at the head of your troop of rebels at Carlisle. If you can disprove that fact, that this is your time to do it." "Have you anything to say in support of what you have observed about the particular day not being proved as laid in the indictment? I should be glad to know upon what your lordship would put your defence. They have proved you to be in arms at Carlisle in November." It is true that

the argument of the counsel did go so far as to insist that marching with military array was sufficient to constitute an act of levying war; but the court did not sanction that argument. His taking possession of and holding the city of Carlisle were the principal grounds of the prosecution. It was principally urged against him that he not only took possession of, but detained the city and castle; that the detainer of any of the king's towns or castles was high treason; that every entry into and holding possession of a town or fortress in a hostile manner against the king is treason; and that where there are several acts of treason laid in an indictment, if any one charge be proved, the person accused must be convicted.

If marching in a military array were alone a sufficient overt act of levying war, would not the court have said, "that it was immaterial whether he marched into the city on a particular day, and held it, or not, because he did march with a great many persons in military array, and therefore levied war, and was guilty of treason." This would have put it out of all dispute whatsoever, and have been decisive evidence of treason against him; because proof of any one overt act is sufficient to support an indictment for treason. But it is plain that the court never considered marching in military array as a sufficient overt act; there is not a vestige to support such evidence. His not being present *when* the city was taken was deemed of no importance. It is nowhere relied on in the arguments as worthy of consideration, because it is not necessary to prove an overt act on a particular day.

I have thought it material and proper for me to dilate on this point, lest this court might *possibly* be of opinion that assembling and marching in military array was sufficient to constitute an overt act. The House of Lords adjourned to the chamber of Parliament, and came to a resolution to take the opinion of the judges on this question: "Whether it is necessary that an overt act of high treason should be proved to have been committed on the particular day laid in the indictment." And the judges were all of opinion that it was not necessary; but "as evidence may be given of an overt act before the day, so

it may be after the day specified in the indictment; for the *day* laid was *circumstance* and *form* only, and not material in point of proof.; and that this was the known and constant course of proceeding in trials." But there was not one expression of the court tending to show (what is so much relied on by the gentlemen on the other side) that being arrayed in a military manner amounted to treason. There was not a word to this effect except some suggestions of the counsel, but altogether unsupported by the court. There was no doubt on the subject, nor any reference to the judges. The marching into and holding the city from the king were deemed sufficient.

But Vaughan's case has been maintained by the gentlemen on the other side to prove that war might be levied without any actual violence done. The indictment in Vaughan's case ought to be considered as being for adhering to the king's enemies. The first count which was for that offence was principally relied on. The judgment in that case can never be considered as a decision that violence is entirely unnecessary to levy war. It does not prove that war can be levied without the employment of force. It does not prove, as he contends, that the prosecutor may lay, that the accused marching in military array did levy war; but he must also state the overt act which he committed. The indictment in that case stated acts done in the vessel called the "Loyal Clencartie." The overt act there laid seems to be considered by gentlemen (and without doubt erroneously) as an overt act of levying war. He went in an armed vessel on the high seas for the purpose of capturing vessels belonging to the British nation. They did attempt to capture one vessel; and superior force only prevented the attempt from being carried into complete effect. As that was an indictment for adhering to the king's enemies, which was proved by his cruising against the English, it cannot be considered as an authority for the purpose of proving that force is unnecessary to constitute treason in levying war.

Foster, 218, has been relied on for the same purpose. He says that "an assembly armed and arrayed in a warlike manner, for any treasonable purpose, is *bellum leva-*

tum, though not *percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects, under a French commission, *France "being then at war with us,"* was held to be adhering to the king's enemies, though no other act of hostility was laid or proved; and he refers to Vaughan's case.

This distinction between the *bellum levatum* and *bellum percussum* is nowhere established. He has no other authority on which to ground the principle. In Vaughan's case, there was an actual cruising in the vessel which he commanded under a commission from the French king, and an attempt to capture vessels of the king's subjects; and she was fitted out to destroy the king's ships.

"Listing and marching are sufficient overt acts without coming to a battle." If he mean an overt act of levying war, there is no authority whatever to support him; not a single case can be adduced. But if he mean an overt act of compassing the king's death, he may be correct. The very acceptance of a commission from the enemies of the king is an overt act. Writing a letter of intelligence to the king's enemies is also an overt act of compassing his death. *Foster*, 220, referring to Vaughan's case, confirms the doctrine, and says "that if a subject of England maketh actual war on the king's allies engaged with him against the common enemy, it is adhering to the king's enemies, though no act of hostility is committed against him or his forces; because thereby the common enemy is strengthened and the king's hands are weakened."

Did the court in Vaughan's case require proof in support of the indictment that Vaughan, with certain individuals, levied war? No: because that very indictment states the acts committed by Vaughan, in being on board the *Loyal Clencartie*, and cruising against the ships of Great Britain, &c.

This, therefore, is the only authority of the kind. Foster is unsupported, if he mean what they say he does; for Vaughan's case is always placed on the ground of adhering to the king's enemies. No man can make or levy war without actual violence. If he join against the allies of the king engaged with him against the same common

enemy, though he does no act against the king's own authority, it is as injurious as levying war on the king, because against his allies, and weakens him by strengthening his enemies ; yet the party would be indicted for adhering to the king's enemies.

East, in vol. i. of *Crown Law,* 123, states that Vaughan was considered as adhering to the king's enemies. "On the other hand, if the overt acts offered in evidence, and not laid in the indictment, be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted, notwithstanding the opinion of Lord Hale to the contrary. As in the case of Captain Vaughan, who was indicted for adhering to the king's enemies on the high seas. The overt act laid was his cruising upon the king's subjects in a vessel called the Loyal Clencartie ; and the counsel for the crown offered to give in evidence that he had some time before cut away the custom-house barge, and had gone cruising in that vessel ; but as that was no proof of his cruising in the *Loyal Clencartie,* the court rejected the evidence."

I cite this case only because East speaks of it as an indictment for adhering to the king's enemies, which may be done without actual violence ; whereas war cannot be levied without the use of some force.

A passage in 1 *East,* 124, has also been supposed to prove that the employment of force is not necessary to constitute the crime of levying war, but that merely arraying in a hostile manner is sufficient. "If," says he, "but one of several acts be well laid and proved, that is sufficient. And if it be laid with circumstances not necessary to constitute the act of high treason, they need not be proved, but may be rejected as surplusage. As in the case of treason in levying war, if the overt act be an arraying in a hostile manner, and thereby killing divers of the king's subjects, if the arraying in a hostile manner be proved, that is sufficient without proof of the rest." He cites the authority of *Foster,* 194, to support this position : that force is unnecessary to constitute the crime of treason in levying war. It is proper to see the authority cited in order to determine whether it justify the

inference made from it. Foster, in that page, says, "*and if divers acts are laid, and but one proved, it will be sufficient, and the verdict must be for the crown.* And, therefore, where divers overt acts are laid, and the indictment in point of form happeneth to be faulty with regard to some of them, the court will not quash it for those defects, because that would deprive the crown of the opportunity of proving the overt acts that are well laid." What is the decision here? That one act proved is sufficient; but there is nothing here said by Foster like declaring that going in a hostile array, without any act of violence, is sufficient to constitute the crime of levying treasonable war. And East does not distinguish between the treason of compassing the king's death (to which only this doctrine can apply) and other treasons. He refers to several other authorities, none of which confirm his position: that "arraying in a hostile manner" is sufficient to constitute a levying of war.

The first he refers to is 1 *Hale*, 122, who has only the same general doctrine: that any overt act well laid and proved will be sufficient; and from whom East and others borrow it.

The next case he cites is Lowick's case, 4 *State Trials*, 718. If you will examine this authority, you will find it was for compassing the king's death; therefore it cannot apply.

Chief Justice. — Does the indictment in that case only charge compassing the king's death? Does it not state a charge or an overt act of levying war?

Mr. Martin. — It is only for compassing the king's death; but it is very special in stating several acts in support of the charge, and particularly the manner of consulting to meet and assassinate the king. He also refers to Layer's case, 6 *State Trials*, 229. That case was also for compassing the king's death; and one of the overt acts to support the charge was the publication in the county of Essex of a treasonable writing to excite the people to insurrection. It is manifest that those are cases of conspiring to kill the king. Enlisting soldiers, marching in military array, writing a letter, meeting to consult, and other acts of like kind, are overt acts of the treason of conspiring the death of the king. That doc-

trine is well understood in Great Britain. There is no idea more clear and distinct in that country, than that these are only acts of that species of treason which consists in compassing the king's death ; and for want of this distinct idea a mistaken opinion has been taken up in America that enlisting men, assembling and marching in military array, are overt acts of treason, without examining the subject further or inquiring what kind of treason, or how such acts can amount to treason. But whatever construction be, and whatever local or extraordinary causes may have induced *there*, for the preservation of the lives of their kings or otherwise, I thank God we know nothing of such *treasons in America ;* and I hope we never shall. Even in that country it has never been solemnly decided that treason in levying war could be committed without any force or violence. In every case where the indictment has been specifically for levying war, we have found the parties assembling and using violence. In the case of The King *v.* Messenger and others, reported by Kellyng, force and violence were used by some of the parties, but not by others. The point came directly before the court on special verdicts ; and the decisions principally turned upon it. Those who had committed acts of violence were adjudged guilty of treason ; but the only two who were not found to have committed any act of force, or to have aided or assisted those who did, were acquitted.

Benstead's case, so much dwelt upon by Foster, is not unaccompanied by force. In consequence of certain unpopular measures supposed to have been adopted by the king in pursuance of the archbishop's advice as privy councillor, it was determined to compel the king to remove him from office ; and the house of the archbishop was attacked by a rabble of some thousands in the day ; and in the night of that day, Benstead, the ringleader, with a multitude to the number of three hundred, went in a warlike manner to Lambeth House to surprise the archbishop. That was considered an act of levying war, because acts of violence were committed, and in opposition to the king's government. I find nowhere so bold a position advanced as that war may be levied without any force whatever.

[Here a few observations were made by the chief justice, which were uttered in too low a tone of voice to be distinctly heard. He was, however, understood to say that marching in military array, armed and in sufficient numbers to exhibit an appearance or posture of war, or of a capacity to accomplish their avowed object, if treasonable, would be an overt act of levying war; and that proof of one overt act of any kind of treason charged in the indictment would suffice to support it, though there were several overt acts of the same or different kinds of treason laid and not proved.]

Hale says in vol. i., p. 146, that holding the king's castles without force is not treason: "The bare detaining of the king's castles or ships seems no levying of war within this statute." The necessity of the use of force and violence to constitute a levying of war is further illustrated by the authority of *Foster*, 219, where he refers to Hale: "Holding a castle or fort against the king or his forces, *if actual force be used in order to keep possession*, is levying war." This shows that there must be *force* used to make it levying of war; as it must be inferred that if actual force be not used, the keeping possession does not amount to levying war. Indeed, he proceeds to say so: "But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason. But if this be done in *confederacy* with *enemies* or *rebels*, that circumstance will make it treason, in the one case under the clause of adhering to the king's enemies, in the other under that of levying war." If a castle or fort be *detained* in connection with *enemies* actually at war with the country, it is treason, though no force be used, because the act of adhering to the king's enemies may be without force. If in conjunction or confederacy with rebels, it amounts to the treason of compassing the death of the king; because in fact it aids and assists rebels who resist his government, and aim at its subversion and his destruction; but it would not be an act of levying war.

Chief Justice. — Suppose a fortified place to be taken by a rebel army, and a detachment who had taken no active part in the rebellion to be put in possession of and

to hold it; I understand you as saying that that garrison might shut its gates, and refuse to open them to the troops of the government, without incurring the guilt of levying war. Do you pretend to say that it would not be treason of levying war in this garrison to shut the gates and detain the place till force was necessarily employed to break them open, although they used no other means of resistance? What substantial difference is there between their employing force against the government, and compelling it, by their resistance, to use force to coerce them? I only wish to understand your argument clearly. Perhaps I mistook your statement.

Mr. Martin. — I mean to say that actual force must be used by them, to make them guilty of the treason of levying war against the government. The parties in the case supposed would be guilty of the treason of compassing the king's death, but not of levying war. This is my opinion of the law. But admit that it is doubtful; if there be a doubt, the court is bound to decide in favor of life. But as to the necessity of force to constitute levying war, I defy the gentlemen to say the contrary, whatever may be jumbled together in the books. But I call on gentlemen to show or find a single case where a person indicted for levying war, in Great Britain, was convicted without proof of his having committed actual violence. In other cases where no violence was used, the indictments were either for adhering to the king's enemies or compassing the king's death. For sending letters of intelligence to an enemy, writing letters relative to a conspiracy, assembling together for the purposes of consultation, enlisting soldiers, furnishing provisions, and such like acts, unaccompanied by force or violence, are all overt acts of compassing the death of the king.

Let us turn to what has passed in America in our own courts. Not a single case can be mentioned where a party, brought to trial for treason in levying war, has not been proved to be guilty of using some force and violence. In every case the party accused has committed acts of violence himself, or aided and assisted, or countenanced and encouraged, those who did the acts of violence. Every individual engaged in the western insurrection used actual violence to a very considerable extent, or was pres-

ent, aiding, assisting, and encouraging those who did the acts of violence.

In Mitchell's case, the overt act charged was the destruction of General Neville's house. It was suggested, in his vindication, that two witnesses did not prove that he was there. One witness swore positively that he was there; and another said that an idea ran in his head that he was there; and to confirm that he was there, they proved by a number of witnesses that he was seen with a body of men marching to Neville's house. It was referred to the jury to say how far his being seen on his march to Neville's house aided the doubtful language of the second witness, who only said that it ran in his head that he saw the prisoner there. The jury thought the overt act sufficiently proved, and that the prisoner aided in the destruction of General Neville's house.

In Vigol's case, the house of an excise officer (Wells's) was burnt, and numerous acts of violence and devastation committed.

Chief Justice. — Have you seen the indictment in the case of Mitchell? It does not describe a course of violent acts, but generally a levying of war.

Mr. Randolph. — The offence in that case was not located as it is here by the terms of the indictment.

Mr. Martin. — The cases in the last Pennsylvania insurrection were also accompanied with force and violence. There was not a single instance of a trial where the party accused was not proved to have committed some acts of violence, or to have aided and assisted those who did commit violence.

No individual has yet been brought before a court of the United States whose guilt consisted of accessorial agency; and there can therefore be no decision at present in the courts of the United States that can show what would be the precise guilt or offence of a person advising treason antecedently, or receiving a traitor after the fact. Hence, as far as we can judge from the decisions in Great Britain and the United States, there has not been a single instance of a person charged with levying war, except where there was actual violence, or the persons accused were present, aiding and abetting those who did the violent acts; nor has there been any decision

where the party was charged with accessorial agency before or after the fact in any court of the United States. If there be any *dictum* found in any decision that leads to express the idea of the court on this point, it is merely an extrajudicial opinion, that deserves no sort of credit; because these points have never come directly before any court to be determined; and as they are yet undecided, the judges ought to come with minds unprejudiced on these questions when they arise. Unfortunate indeed would it be for the citizens of America, if it were to be generally believed that there was no danger from these doctrines, as the gentleman says, to any person if not guilty of treason. But does not the gentleman know that innocent persons may be unjustly accused by the government, or individuals who wish to destroy them? that doctrines involving the dearest rights, the liberty and safety of the people, ought never to be established by a bare *dictum* or a hasty expression? that they ought only to be settled on the fullest authority and most mature deliberation; after the fullest argument by able lawyers on both sides shall have fairly explained every point; after the fountain-head shall have been resorted to, and everything shall have been examined from the first source?

But, sir, to all this, as I understand gentlemen, they have placed in array against us what they say has been decided in the case of Bollman and Swartwout by the Supreme Court of the United States. They say that it is in vain for us to adduce authorities from Great Britain. Mr. Hay tells us that we are stopped by this decision in the first step. It is a fact well known that the grand jury never would have found a true bill if they had not mistaken that opinion of the Supreme Court; nor would my client's life be thus exposed, if, indeed, an extrajudicial opinion is to deprive him of his life.

But let me examine that opinion. With great respect and deference to every gentleman concerned in giving it, I think I can prove that the gentlemen on the other side are mistaken as to that opinion, and that it is extrajudicial. The opinion of *Foster*, 36, has been already referred to, in order to show how little weight such an opinion ought to have. He expresses himself in strong terms; and his opinion ought to be considered as great

authority. But the following case is conclusive. I mean the case reported in *Vaughan's Reports*, 382, which has been referred to. But it is too strong for my friends on the other side, as they have not noticed it. I suppose it struck so severely home that they could not answer it. It certainly is decisive of this question. I will read it to your honors.

"An extrajudicial opinion, given in or out of court, is no more than the *prolatum* or saying of him who gives it; nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. *An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given, if no such or a contrary opinion had been broached, is no judicial opinion, no more than a gratis dictum.*"

But this opinion, so much relied on, will, when examined, be found to be perfectly extrajudicial, as to the purpose for which they have introduced it. It is not a judicial authority, or a direct decision on a point immediately before the court. It is no more than a *gratis dictum.*

But the gentleman said that "as the learned gentlemen had argued the cases of Bollman and Swartwout, and it was fully discussed, we must know that the court had fully examined the assemblage on Blannerhassett's Island, its circumstances, its effects, and the connection of Colonel Burr with it. The question, whether Colonel Burr could be affected by that assemblage when he was two hundred miles off, never came before the court. If the gentleman had read the evidence in those cases (and the whole of it has been published with the other proceedings), he would have found nothing about Blannerhassett's Island or the assemblage in the whole testimony. Not even so much as the name of the island is mentioned in it. He would have found nothing said in it of the assemblage, or how it could affect Colonel Burr when he was two hundred miles distant from it. He would have found that the whole rested on the depositions of Generals Eaton and Wilkinson, Mr. Donaldson, the friend of General Wilkinson, the two officers who came from New Orleans, and the ciphered letter. The only question before the court in those cases was, whether Bollman and

Swartwout should be committed for treason. I shall not take up the time of this court in reading that opinion, as it is well known to it. But the court decided unanimously that there was no proof that treason had been committed by Colonel Burr, or any other person; that there was not the least proof of treason; that if there were any proof, it was no more than of an expedition intended against the Spanish provinces — an expedition which, as it depended on a war with Spain (of which there was then the greatest probability), would have been honorable if the war took place, and no treason if the war did not take place; a war in which, if he succeeded, he would have acquired honor and glory; and which in any event would have been but a misdemeanor, by which neither his honor nor reputation could have been sullied. There was not one word of treason proved before the court: how could it decide that there was a treasonable assemblage, or any acts of violence? There was no fact, brought before the court, on which such a decision, as gentlemen contend to have taken place, could be made; and therefore, if the court had made such a decision, I have the authority of Vaughan and Foster to show that it would have been entitled to no respect. If there had been any probable ground to believe that treason had been committed, and that they were implicated, Bollman and Swartwout would not have been discharged from confinement. The subject was not only very important to them, but also to Colonel Burr; and even after General Wilkinson's letter had been taken into consideration, still there was not an atom of evidence to prove treason against Colonel Burr. That this is true and in substance correct, I believe I could appeal to your honor. The particular circumstances attending the judges of the Supreme Court strengthen this argument. When this opinion was given, only four out of six judges could sit. One of them was sick; and another, a gentleman of highly distinguished talents in the law (Brockholst Livingston, Esq.), was obliged to go home on account of the sickness of his family. Would four judges, in an extrajudicial manner, have undertaken to settle the construction of a law so infinitely important to the United States? Would they have decided so important a question in a collateral,

irregular manner, on a point not immediately before them, and that also without the aid of the other two judges? Gentlemen say that they understand the opinion of the Supreme Court correctly; but the counsel concerned with me say that they do not. However that may be, whether they correctly understand it or not, it certainly deserves no credit as binding on this court. As a binding judicial opinion, it ought to have no more weight than the ballad or song of Chevy Chase.

This is immaterial to the gentlemen on the other side, because they think that if it were to be considered as a valid judicial opinion, it would convict the accused. They are therefore amazingly pleased with it, and affect to consider it as true and orthodox as the gospel, and endeavor to forestall the opinion of this court by its supposed authority. I am far from saying that they are dishonored by it; but I see no great honor in endeavoring to forestall the opinion of the court, and insisting that the question has been already decided, and that the law is settled, whether it be right or not.

I therefore conclude that there has been no decision in England or America establishing the doctrine that war can be levied without the exertion of violence or the employment of force, and that there has been no case in the United States wherein the criminality of accessorial agency has been considered and determined. There has been nothing but a mere *dictum* that has no sort of authority as a legal decision. This necessarily leads me to a part of my argument which involves further inquiry into that subject.

I beg leave to make a few observations on that part of our inquiries which relates to the great constitutional question, whether a person, who in Great Britain would only be guilty of accessorial agency, can be guilty of treason in the United States. Is an act of accessorial agency before or after the fact in treason, in the United States, treason or not? Here I beg leave to observe that we ought not to be misled by the argument of the gentlemen: that the most guilty might pass unpunished by the negative of this question. The question is not whether a person can by procuring treason to be committed, or by receiving and comforting a traitor, be guilty of a crime.

No person will doubt but the person who is guilty of advising treason is guilty of a great crime, and liable to punishment; but the question which I propose to examine into is, whether that crime be treason or not. He who advises, procures, or persuades another to commit trsason is highly criminal, and merits very severe punishment. The receiver of a traitor, knowing him to be such, is highly censurable and punishable. But we aver that neither of them is guilty of treason within the true interpretation of the constitution of the United States. Every preparation made for the purpose of making or levying of war is not an act of treason, because nothing but making war for the purpose of changing or subverting the government of the United States is treason. Every act of those who make those preparations to levy war is criminal; and the government has an undoubted right to use the force of the country, and all the means which the laws allow, for their suppression. The government has an unquestionable right to punish those persons, and prevent their acts from being ripened into acts of treason. It is not the question, whether the government be to look on passively, and see those preparations matured, without opposition, which are intended for its destruction. No person doubts the right of the government to punish those persons, and prevent the maturity and success of their plans. So clearly was the Congress of the United States of opinion that preparation to levy war was not treason, that, if I mistake not, there was an act passed last session, expressly punishing such preparatory acts. It passed one branch of the legislature, and was sent forward to the other for its concurrence. I am not certain, but I believe it passed.

Chief Justice. — I believe it did not pass.

Mr. Martin. — It is immaterial whether it passed or not. It was in contemplation, and deemed necessary, whether the law passed or not. The only question is, whether a person who advised or procured treason to be committed be guilty of high treason or not. No person doubts that he is guilty of a great crime or a high misdemeanor; but is the offence of which he is guilty treason? But gentlemen ask what a deplorable situation the country is in if such an offence be not treason. As

if the people and government were bound hand and foot, and could take no step to prevent the levying of war; as if, because, he who only prepares to levy war cannot be punished as if he had actually levied it, he must escape entirely with impunity! as if, because, preparation is not the same as consummation, there was no possibility of punishing it! This is begging the question entirely. There is no doubt that for so doing he would be guilty of treason in Great Britain; because it would be evidence to support an indictment for compassing the death of the king. But can a person, who only advises war to be levied, be said to have actually levied it. Gentlemen say that he had all the *moral* and *intentional*, and, therefore, ought to be considered as having the actual, *guilt* of it. Let it be so, that he has all the guilt of giving the *advice*, but not of the *act* of levying the war, because he never committed it. The court is to decide according to the constitution and laws. What prevented the framers of our constitution from providing that persons who should counsel, commend, or procure levying of war against the United States should be guilty of treason? As they made no such provision, they did not intend it. There is another reason which prevents a mere counsellor or adviser of treason from being guilty of the treason of levying war. It is this: that levying war is of itself an open, public act. It is of such notoriety, that everybody may see it going on. It is carried on publicly in the face of the world when the parties are levying it. It cannot from its nature be concealed from the public view. The word *public*, we say, is material, though omitted in this indictment. It ought to be laid, because it ought to be proved. The authorities show that it ought to be so charged; and that levying of war must be an act of such notoriety, that every one sees it. When troops are levied, and when they march through the country, &c., the people behold them; and the knowledge of the fact is universal.

We have had two insurrections in Pennsylvania: the one named the *whiskey insurrection*, and the other the *hot* water insurrection. If I were to name this, I would call it the *Will-o'-the-wisp* treason. For though it is said to be here and there and everywhere, *yet it is no-*

where. It exists only in the newspapers, and in the mouths of the enemies of the gentleman for whom I appear, who get it put into the newspapers.

But as acts of war must be open and public, if war exist at all, it may be easily proved. If false, it may be easily proved to be so. If a man were to come forward and say that war was made, that armies marched and took towns and places, laid waste the country and took contributions from the inhabitants, if it were true, it could be proved by everybody; if false, it could be disproved by everybody. Open and notorious facts are susceptible of easy proof or contradiction.

But an advice previously given to commit treason is not in its nature susceptible of clear, explicit proof. It may be given in private, and may be pretended to have been given when it was not. Innocent persons may be implicated. Communications or declarations may be feigned to have been secretly made, which never were made. Persons having enmity against others, and intent on their destruction, may be brought forward in a court of justice as witnesses against them, and gratify their resentment, by the disclosure of conspiracies which never existed but in their own malice; because they are secret crimes incapable in their nature of being directly refuted or disproved. If open deeds, notorious facts, are not to be the only evidence, confessions must be received. But neither declarations made before the fact with respect to the intention, nor acknowledgments afterwards with respect to the intention or the commission of the fact, unless made by the accused in a court of justice, ought to be admitted against any person; for they can be easily feigned against him by an enemy to gratify his resentment. If a thousand persons were to come forward and prove such confessions or acknowledgments on the part of the accused, they ought not to be admitted as evidence against him; because, however contrary to the truth they might be, they are in their nature incapable of being disproved. Here a crime is said to be secretly committed. Perjury, which is most easy to commit, and most difficult to detect, is used to prove it. How can it be repelled or disproved? But if an open deed of actual war must be proved, if neither advising nor procuring of treason, if no

kind of accessorial agency can be established by confessions, declarations, or acknowledgments, the innocent cannot suffer. If any persons were to come forward as witnesses to prove treason by such declarations and confessions, the accused would be placed on sure ground against the effect of perjury, by the necessity of proving open, public acts. The non-existence of a fact, which, if it existed at all, must be public and notorious to the whole nation, would be to the innocent a perfect safeguard against perjury. The want of this open and public proof would discourage and prevent attempts to commit perjuries that could not be successful. In such case a witness might be confronted with the facts. It would not suffice for him to say that the accused acknowledged in his presence that he advised or procured treason to be committed by levying war against the United States. But if the contrary doctrine be to be maintained, if the acknowledgment or confession of the accused will be sufficient to prove him guilty of treason in the United States, how is he to guard himself against perjury, and disprove that he advised treason to be committed, or made such acknowledgments or confessions? An advice is not a public act. Counsel is not an open act that can be proved. It is a secret of which the public in general can have no knowledge. Any man may have secret enemies, who may wish to destroy him; and this they could not do more effectually than by giving false testimony against him, charging him with confessions and acknowledgments which he never made. In order, then, to guard against the oppressive designs of any administration, the framers of our constitution, who did not know who would be, or what persons would have to conduct the administration (and the present is the best that can be), provided that no person should be convicted without proof of the same *overt act* by two witnesses (the one to support and confirm the testimony of the other), and thus put it out of its power to destroy any man who might have powerful enemies, or whom it might mark out as its victim, by evidence of confessions or acknowledgments, by construction, or by any testimony short of an *overt act*. They knew the facility with which a corrupt administration, if without check or restraint, might accomplish the ruin of

any man it wished to destroy. They knew that such an administration might select any person in the United States whom it wished to destroy, and get two persons (such as would be requisite for the purpose) to come before a court of justice, and swear that they had, each of them, received letters (forged for the purpose) from the remotest parts of the United States, giving information of the existence of a conspiracy against the government, and describing the designs, motives, and means of the conspirators; and that the person thus selected and accused did acknowledge his participation in the conspiracy — how is the accused to guard himself against the perjury? This kind of evidence is incapable of disproof. He could not possibly defend himself, if some act were not necessary to be proved.

The framers of the constitution wisely determined that no man should be guilty of treason in such a case. They would not expose the life of any man to the hazard of being destroyed by perjury incapable from its nature of being disproved. They have secured a probability (if not a certainty) that the accused cannot be convicted unless he be guilty. They have not secured him from the resentment or hatred of private individuals (for that is impossible), but they have taken care that he is not to be charged with private acts incapable of disproof; with confessions and acknowledgments unsupported by probability; so that while there is a probability of the guilty being punished, the innocent is secured from being sacrificed to the malignant resentment of his enemies.

These principles are such as ought to have directed and influenced (and no doubt did) the conduct of those who framed the constitution: men selected for their wisdom and patriotism to devise a system of government, to secure and perpetuate the liberty and happiness of their country. No gentleman, who had read and considered ancient history, and knew the various systems of oppression which had existed in different countries, and the necessity of protecting innocence, as well as punishing guilt, would have subjected his country to such misery as that any man could be convicted on evidence impossible to be disproved: and of this nature are all acts of accessorial agency before the fact in treason, as advising,

counselling, commanding, &c., as well as many acts of accessorial agency after the fact.

I have made these observations to show the principles on which the convention might correctly have determined to exclude this doctrine of accessorial treason. Let me now make some observations on the constitution itself, abstractedly from the consideration of those principles which must have most probably actuated the convention.

The gentleman who so ably opened the debate (Mr. Wickham) correctly said that the constitution, which was made to perpetuate the liberties of the people of this country, is to be construed differently from a statute law; that it is a sacred compact made between the United States, in their corporate capacity, and every individual belonging to the United States.

The United States in their corporate aggregate capacity have pledged themselves to the people of America, that this constitution shall be the safeguard of their liberties, and a barrier against encroachments on their rights; and that it shall continue unaltered, unless amended by a constitutional majority. As to all statutes to be enacted by any succeeding legislatures it is a compact that they shall not impair the great principles of, or transcend the limits prescribed by, the constitution. In this view it is a compact between the United States and individuals; but when any question, arising under any part of it, comes before a court of justice, when any part of it is to be considered judicially, it is to be considered as the supreme law of the land. It is to be construed by the very terms of the compact itself: "This constitution and the laws of the United States, which shall be made in pursuance thereof" — "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The judges are thereby rendered incapable of making any decision in support of any law contravening its provisions or principles; and if any law passed by the legislature be contrary to any of the provisions of this constitution, the judges, who are to pronounce judgment on the rights of individuals affected by such unconstitutional law, shall consider it as void and null, as far as it contravenes or violates the constitution.

The gentleman also said that the framers of the constitution intended to guard against constructive treason. This principle is so self-evident that it cannot be controverted. It neither has been nor can be denied. They certainly intended to make the question, what shall be said to be treason, as clear as possible, so that there should be no doubt. I ask what constructive treason is, but that treason which the constitution does not mention in plain and express terms, but is inferred from circumstances by implication and construction. The terms employed by its framers are admirably calculated to exclude all construction and implication. He who reads with an intention to understand, cannot possibly mistake their meaning. They tell him in plain terms that treason against the United States shall consist but in two acts: "*that it shall consist only in levying war against them*, or in adhering to their enemies, giving them aid and comfort." He who levies war against the United States, and he who adheres to their enemies, giving them aid and comfort, are traitors, and none other, by the very positive and plain language of this compact. Does the constitution say that he who advises these acts, that he who receives or comforts any person who has done either of these acts, is guilty of treason? No person will say that he who counselled an act of war to be done is the person who actually did it. No person will say that he who advises another to adhere to the enemies of his country is the person who actually did adhere to them. He who advises, procures, or persuades, he who receives, comforts, or protects, or even he who has been active in aiding and assisting, but absent at a remote distance from the scene of action, is not the actor. The parts which these persons perform are all essentially different. Have the judges who judicially expound this constitution any authority to make the act of advising or comforting treasonable by construction? Is it not by construction that a man is made guilty of having levied war who only advised it? Is it not by construction that he is rendered guilty of levying war who only gave a night's lodging to a person who did assist in levying it? Is it not by construction that giving a dinner to a man in distress is tortured into levying of war? Is it not by construction

extravagantly extended, that they make a party absent at a great distance constructively present and constructively guilty of the acts of others? Is the constitution of the United States to be taken by construction contrary to its own plain and explicit words? It is the same as if the constitution had expressly said that there should be no constructive treason, no constructive presence, no constructive agent.

Never did I expect to hear advocated by those gentlemen the principles now laid down. Gentlemen say that there is to be no constructive treason, that no aid is to be required or received from construction, but that the constitution is to be expounded by the plain import of the words used. While they made these unequivocal admissions, I never expected to hear advocated the doctrine which they have maintained; that they would have advocated such a principle as that an assemblage of men without force was a sufficient act of levying war. Our courts of justice never went farther than to say that an assemblage with actual force and violence might in certain cases be sufficient to constitute an overt act of levying war, but that it would depend on circumstances; that if the assemblage committed acts of violence in resisting the execution of any law of the Union, with an intention to compel its repeal, or to subvert the government of the United States, it amounted to treason; but no decision in this country has gone so far as to determine that an assemblage of persons, without a single act of violence, constituted an overt act of treason.

I know it to be the sense and sentiments of that part of the community with whom they act (and of parts with whom they do not act), that the courts of justice went far enough in their construction of treason; and many think that they went too far, and that they will never extend that construction farther. I think that I may safely say that I know they are not prepared to go so far as to decide that a mere assemblage of persons, without a single unlawful act, without the least force, can constitute an act of levying war.

The gentleman who went before me also cited the case of Sir Nicholas Throgmorton. It has been truly said that it was an indictment established by the most corrupt

and wicked of judges, in the most corrupt and wicked of times. There is no doubt that the conduct of the court was scandalous and shameful in the extreme; and that he was doomed to the scaffold; and would have been sent to it if a jury of honest men had not rescued him by an acquittal out of their hands, and put him out of the way of the vengeance of the crown. It is on such occasions only that we can justify the principle, that a jury may sometimes disregard the opinion of the court. And when a bloodthirsty judge dooms it to destruction, they can save innocence by a general verdict. I ask gentlemen, and leave them to reflect and answer, whether there ever were, in the whole history of British jurisprudence, any case in which it was said that a jury ought to disregard the opinion of the judges, not to save innocence from the scaffold, but to put to death an innocent man. In the whole history of jurisprudence, can a case be found where the court had given an opinion to the jury, that, if they believed the testimony proved certain facts, the prisoner ought under the law to be acquitted, but the prosecutor rose and told the jury, "You ought to find a verdict against the opinion of the court, and convict the prisoner"? No, sir; such a case never occurred, and never can be found. That phenomenon has remained for an American court of justice to exhibit. If the counsel for the crown had advocated such a doctrine in Great Britain, he would have been regarded with universal detestation. I do not say that it would be so considered here, or that it ought to be. These cases, so far from being adduced as precedents worthy the imitation of our judges, are pointed out as beacons to shun the course pursued there in those times of tyranny and oppression.

The gentleman who opened this argument also adverted to the case of Lady Lisle. But the gentlemen affect not to discern the motive of adducing it. It was not merely to prove that American judges ought to hold in detestation the cruel and oppressive conduct of the court in that case, that the trial of Lady Lisle was mentioned by my able coadjutor, but to show that every indictment for accessorial agency must charge the accused specially; and that it was the only case, where an accessory has been tried before the conviction of the principal (unless

where both are tried together); and also, that the very exception confirms the general principle; as the attainder was afterwards reversed for irregularity and injustice.

Lady Lisle was prosecuted for comforting and receiving a traitor before the bloody Jeffreys. But in that case the indictment was special, as is manifest from the report of the case in 4 *State Trials*, 106. The indictment is set forth at large, as in most of the cases reported in the State Trials. It charges her with "knowing John Hicks to be a false traitor, and as such traitorously to have conspired the death and destruction of the king, and war, rebellion, and insurrection to have levied and raised against him within the kingdom; and that she on the 28th day of July, in the first year, &c., the said John Hicks in her own house secretly and traitorously did entertain, conceal, comfort, uphold, and maintain," &c. "And that to the said John Hicks, meat and drink, traitorously, she did give and deliver," &c.

Full notice of the charge against her was given her in the indictment; but illegal evidence was corruptly and oppressively admitted to support it. No evidence could be legal till the record of the conviction of John Hicks was produced. He never was tried; yet she was convicted. It was argued on her trial, as a justification of the prosecution, that those who received traitors were as guilty as those who advised or procured treason to be committed.

An argument was correctly deduced from particular laws of the United States, showing that they made particular provisions on this subject; punishing in a particular manner rescuers of persons convicted of treason, murder, or other capital crimes, and rescuers of persons committed for any of the said offences, inflicting the punishment of death on the former, and only fine and imprisonment on the latter; which proved the judgment of the legislature to be that those provisions were necessary; and that accessories, if at all punishable, were only so by special laws made for the purpose: of this, however, I shall speak more fully hereafter.

The gentleman went on to show that the common law could not be brought to aid them to make that treason which was not so before; to make an act of accessorial

agency amount to treason, though not so without it. They have admitted fully, that the common law cannot be received for the purpose of making that a crime which is not so by the constitution of the United States, and laws made in pursuance thereof. But they admit that the common law, by the adoption of certain technical phrases in the constitution, is so far in force, as to direct the sense or meaning of certain crimes, and the mode of proceeding on trials for those crimes. For instance, if a statute say that "if a man commit murder, he shall be punished so and so, and the constitution say that the trial of all crimes (except in cases of impeachment) shall be by jury," the common law must be resorted to for the meaning of the word *murder:* and as the party accused is to be tried by a jury, the common law must be resorted to for the purpose of ascertaining the meaning of the word *trial* and the word *jury*. The common law informs how many men shall constitute a jury; that it shall consist of twelve. It says that no person shall be *convicted* of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The common law must be resorted to for the meaning of the word *convicted*. It explains it to mean that the jury must be unanimous to find him guilty. But that beyond the effect of those technical phrases which express the powers delegated to the government, the common law has not been adopted under the government of the United States. Does it not follow, as a necessary consequence, that no man can be guilty of an offence against the United States merely at common law? Is it not clear that the principles of the common law, as existing in Great Britain, cannot be applied here so as to make that an offence which is not so by the constitution and laws of the United States? Can the common law be resorted to in order to explain the constitution so as to make that a crime which would not be so without it? On that point I can readily declare to the gentlemen, that I have always been of the same opinion which they declare themselves to hold. I never did consider that anything could be prosecuted as a crime against the United States, unless it were made so by the constitution, or some law enacted pursuant to it. I perfectly agree

with the opinion of Judge *Chase*, declared in the case of the United States against *Robert Worrall* for an attempt to bribe Tench Coxe, the commissioner of the revenue, reported by *Dallas*, vol. ii. 384.

He said that though this offence was highly injurious to morals, and deserving the severest punishment, yet it was not punishable by the constitution or laws of the United States; and therefore, as it was an indictment at common law, it could not be maintained in the federal courts. He would not say whether the offence at that time were pnnishable in a state court. It has, however, been held that these sorts of offences may be punished in the state courts; and it is so held by the party in power.

There is an indictment depending in a court in Connecticut against a judge of that state for speaking words of disrespect against Mr. Jefferson. But in a court of the United States, this offence, being founded on common law principles, could not be maintained.

Mr. Hay. — They will make nothing of that prosecution.

Mr. Martin. — No principle of the common law can be applied which the constitution does not recognize, or laws pursuant to it authorize. When the constitution says that "treason shall consist in levying war or adhering to the enemies of the United States, giving them aid and comfort," it is clear that the person who merely advises either of those crimes, is not considered as an actor, and therefore cannot be guilty of it; and that the rules of the common law respecting accessories, not having been adopted in it, cannot apply here.

But the gentleman says that they do not support this construction by the common law, but by common sense; that he is guilty in "*foro cœli*," as David was guilty of slaying *Uriah the Hittite* with the sword; and that being so, he is equally guilty in "*foro seculi*." But, as Foster says, the offences are specifically different. Though the accessorial offence may be as injurious to society, and as atrocious in its nature, yet the facts which constitute it are essentially different from the acts done by the immediate actor. The equality of guilt does not constitute identity of facts. It does not prove that he who advised the fact made the war. The constitution lays it down

expressly that those only who commit the fact by levying war or adhering to the enemies of the United States, giving them aid and comfort, shall be guilty of treason; and I have already assigned sufficient reasons why the framers of the constitution should have thus limited the offence of treason, and prevented those constructive treasons which had been so often made the engine of the most cruel oppression.

The gentleman concerned with me correctly observed in his argument that when a statute created a felony, the common law was ingrafted upon it; and that advisers and procurers *before*, and receivers and comforters after, the fact would in such a case be punishable as accessories of course; that a statute made in affirmance of the common law, or to supply its defects, must be expounded according to it; and therefore, if a statute make an act, which was criminal at common law, felony, the same consequences would follow as if it were felony at common law.

On the observations which he made on this point, one of the counsel for the prosecution (Mr. Wirt) made some illiberal animadversions. Among other remarks mingled with asperity, he accused him of adducing as authority the mere argument of counsel. He went even so far as to insinuate (because Hobert, among other authorities, was referred to in the case cited by my friend, from 10 *State Trials*, 436, and he could not procure the book), that we had stolen a march upon him. But I hope it will not be difficult for me to show that my respectable friend was not incorrect in his statement of the law; but that if you consider the whole of his argument, he was clearly right. As to the objection to the observations of the counsel (Mr. Hume Campbell), I will only remark that the court acquiesced in the correctness of his argument; and it was reasonable in Mr. Wickham to suppose that what was admitted to be authority there would be admitted to be so here.

He observed that the rule that "when a felony is created by statute, accessories to it, though not named, are punishable, and that all legal consequences of felony are attached to it by the common law, *except where the special nature of the act leads to a different conclusion*," is illus-

trated by the decision on 28 Hen. VIII., chap. 15, which makes *piracy* an offence not punishable at common law, felony; that it has been solemnly adjudged that as this was not a common law offence, and not made in imitation or supply of it, it should not be construed according to the rules of the common law; and therefore that accessories to it were not punishable. *Hawkins*, in vol. i. *P. C.* chap. 37, sec. 6 and 7, page 153, says that "in the exposition of this statute, it has been holden, first, *that it does not alter the nature of the offence* so as to make that which was before a felony only by the civil law now become a felony by the common law; for it must be still alleged as done upon the sea, and is no way cognizable by the common law, but only by virtue of this statute." "From the same ground, also, it follows that no persons shall, in respect of the statute, be construed to be, or punished as, accessories to piracies before or after, as they might have been if it had been made a felony by the statute — that accessories to piracy being neither expressly named in the statute, nor by construction included in it, remain as before." (See before, vol. i. page 549.)

This statute declares that "all felonies and robberies, &c., upon the sea, &c., where the admiralty have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm — in like form and condition as if such offence or offences had been committed or done in or upon the land." It proceeds further to state that the commissions to the admirals and others to be appointed should "authorize *them* to hear and determine such offences after the common course of the law of the land, used for felonies or robberies done and committed upon the same." It further provides that they shall be proceeded against as felons for felonies committed on the land; and that those that should be convict of any such offence, by verdict, confession, &c., "shall have and suffer such pains of death, losses of lands, goods, and chattels, as if they had been attainted and convicted of such offence done upon the land."

Here is an act declaring that persons guilty of piracy shall suffer the same pains and forfeitures as if they had committed these acts of violence and robbery on the

land ; but it makes no mention of accessories before or after the fact ; and therefore the courts of that country construed it not to extend to them.

The constitution declares certain specific acts to be punishable: the making of actual war, and an actual adherence to the enemies of the country, giving them aid and comfort.

But the constitution does not say that advising, procuring, &c., those acts to be committed, shall be treason. The inference, therefore, is natural and inevitable, that such advisers and procurers are not traitors within the true meaning of the constitution according to the maxim, "*Expressio unius est exclusio alterius.*"

But even if, as they have argued, common law principles were to be applied to expound the constitution, if I understand them rightly, they are a strong authority to show that accessories are not punishable ; and that those persons only who do the acts of levying war and adherence to enemies are so. No principle of the common law is more clearly understood than that the expression of one thing is an exclusion of another, especially in penal laws.

The best authorities show our construction to be correct: that no person is punishable but those expressly mentioned in the constitution. How easy was it for the framers of the constitution, if they intended to make accessories before and after the fact equally as punishable as principals, to have done so! Would they not have said that accessories before and after should be as guilty as the principal actors? Would they not have said that those who aided and abetted traitors before the fact, or those who afterwards received and comforted them, should be guilty of treason? They have said no such thing. They have confined the crime to actors only, as in the cases of piracy. They have mentioned two cases or kinds of acts which should constitute the guilt of treason ; and as far as the principles of the common law apply, they exclude entirely all other kinds except those two thus expressed; for if any other kind had been intended to constitute treason, they would have been also expressed.

Again, sir, a most powerful argument, to prove the legislative exposition of the constitution, is deducible

from the act of Congress referred to by the gentleman who introduced this subject. He observed that it was clear and evident, from a law passed soon after the adoption of the constitution, that the legislature did not consider that an accessory would be guilty as a traitor under the constitution as he would be in Great Britain, because they made a special provision that if any person should break jail and rescue therefrom any person convicted of treason, he should be punished with death. Sir, in Great Britain the rescuing of a person convicted of treason is treason; and if the construction for which the counsel for the prosecution now contend had been deemed correct by the legislature, this provision would have been superfluous, and therefore would not have been made.

But this act of Congress goes still further, and provides that if any person shall by force set at liberty or rescue any person *committed* but not *convicted* for any of the offences aforesaid (treason being included), every person so offending shall on conviction be *punished in a small fine* — only the sum of five hundred dollars, and imprisoned a year. Sir, in Great Britain the man who breaks open a jail and lets out a person committed therein for treason is a traitor, provided the person let out or rescued be afterwards convicted of treason. If our legislature had considered a rescuer as guilty of treason and punishable with death, would they have passed a law inflicting on him only the trivial punishment of a year's imprisonment and a fine of five hundred dollars? And yet he cannot be punished twice for it. If, in truth and reality, the receiver and protector of a traitor were guilty of treason under the constitution, how came the legislature to provide so small a punishment for the person who breaks open jail and rescues a traitor? How inconsistent and improper is the infliction of so moderate a punishment on the jail-breaker and rescuer, if the mere receiver or comforter of a traitor before he is put in prison at all is punishable with death! He who forcibly opposes the laws and rescues a traitor from jail is only punished with imprisonment not exceeding a year and a fine not exceeding five hundred dollars; while he who merely receives or comforts the traitor before he is committed for the crime, or after he has made his escape, is

punishable with death! because in Great Britain he who receives or comforts persons guilty of treason is a traitor and punished with death, as the unfortunate Lady Lisle was.

And if our constitution embrace no other acts as amounting to treason than what are expressly mentioned in it, it results of necessity that only the two offences of *actually levying war* against, and of adhering to the enemies of, the United States constitute treason. This is in my mind conclusive to show that our construction is correct, and that accessories before or after the fact were not contemplated by the constitution as traitors.

We see what a system of oppression, persecution, and tyranny was formerly adopted in Great Britain by the means of constructive treason and corrupt and pliant judges. Blackstone speaks of them in terms of reprobation; but he says what has been urged in this case, that those severe laws and punishments were adopted and put in force *propter odium delicti* for the suppression of crimes. But if he had said that they arose from the servile disposition of unprincipled judges to gratify tyrannical kings, to extend the doctrine of constructive treason, he would have been much nearer right.

The doctrine of constructive treasons, the rule that all are principals in treason, and that whatever in case of felony would render a man an accessory will in case of treason make him a principal, originated in the worst of times, in the most tyrannical reigns, and when the most corrupt and wicked judges sat in the English courts, as has been most ably and clearly shown by Judge Tucker, in his notes in the fourth volume of Blackstone's Commentaries. Judge Tucker has, by this invaluable work, erected to himself a monument much more durable than marble or brass. Marble may be destroyed by the ravages of time or the elements; brass may be corroded and mouldered into atoms; but the name of Tucker shall endure as long as the press shall be able to communicate events; shall be transmitted from age to age, and revered to the latest period of time by the people of the United States, for his great and glorious efforts in settling the law of treason under the constitution. Yes, sir: as long as the principles of civil liberty shall be admired by

posterity his name will be blessed as one of their greatest benefactors.

He has in the most enlightened manner demonstrated that the principles adopted in Great Britain are not law; that they were adopted in the most corrupt and arbitrary times, whose examples ought not to be quoted. He shows that this doctrine lay dormant from the year 1488 to the year 1554, when it was revived upon the trial of Sir Nicholas Throgmorton, in the first year of the reign of Queen Mary. Stanford, queen's serjeant, author of the *Pleas of the Crown*, was one of the prosecutors, and very active against the accused. He brought forward those principles when corrupt judges sat (Brumley, chief justice, Sir Nicholas Hare, Sir Roger Cholmley, and others), and in a reign which destroyed almost all law and civil liberty. As a reward for his services he was soon afterwards appointed chief justice of one of the courts. He published his *Pleas of the Crown* six years afterwards (in 1560), in which, to gratify the malice and vengeance of the crown, he takes care to state this principle as law. But Judge Tucker has corrected it, and, by tracing the doctrine to its prime source, shown what little credit ought to be attached to it in the United States. None of the writers who notice it as a general principle have, like him, attempted to trace the doctrine to its origin, or to explain the grounds on which it ought to be considered as law, or when the principle was first attempted to be brought into action; and they generally endeavored to gratify the monarch in their writings. But Judge Tucker has most clearly shown that the position laid down in Stanford is incorrect; that after him Coke, who was as bloody-minded as any of them, lays down the same principle at a time when the spirit of persecution was at its height; and that Hawkins and Hale take it up after them; and just as a flock of sheep jump over the fence one after another, they adopt this doctrine in general terms, merely referring to the preceding authorities, without examination or explanation.

I will not take up your time in reading it, but refer your honors and the gentlemen to this very valuable work at large.

But Judge Tucker does not rest satisfied with this dili-

gent, able, and critical examination of this doctrine. He improves it with many remarks and reflections no less pertinent and striking than they are profound and judicious. He states solemn and awful truths. He depicts in lively colors the evils and dangers to the present and future ages to be apprehended from faction, which is the same at all times and places. He points out the oppression that may be practised under a popular government by one party over another; that innocence can be no security against vindictive persecution; that the innocent may be exposed to the rage of the prevailing party; and if the other party come into power, they will retort their vengeance on the opposite party; that the prevailing faction will destroy a man with as little feeling as a philosopher will observe a rat in an air-pump struggling with death under his experiments; and that every vestige of freedom may be utterly destroyed in the fury of contending parties.

But I trust that such monstrous doctrines will never be established here. It is impossible for me to feel a doubt that the judges of the United States will recognize the opinion of this enlightened judge; and that they will never give in to the construction which the counsel for the United States have so zealously maintained.

The authority of 1 *East*, 100, before cited, proves that advising, procuring, and abetting to levy war is not levying war; that the war must be actually levied by the person advised, or the adviser cannot be a traitor merely on account of an ineffectual advice and encouragement; and if nothing be done in pursuance of the advice, there is an end of the case; and the adviser, however criminal his conduct, would be innocent of the charge of treason. There must be some person who levies the war; and then, by the principles of the common law, wherever it prevails, the adviser or procurer will after this conviction be liable to be prosecuted.

In *Bacon's Abridgment*, title *Treason*, under the subdivision of levying war against the king, it is laid down that "as the words of this clause are '*doth levy war*,' a conspiracy with a design of levying war against the king does not amount to an overt act of this species of treason; *for this offence cannot be without an actual levying*

of war." Again, he says, that "every assembling of a number of men, though they are armed with weapons offensive and defensive, is not such a levying of war against the king as is within this clause. Again, in another clause, he saith that "the statute 25 Edward III., by which it is declared, 'that if any man doth ride armed, openly or secretly, with a number of armed men, against any other to slay him, or to rob him, or to take and detain him, until he pay a fine or a ransom for his deliverance, it is not the intent of the king and his counsel that in this case it be adjudged high treason ; but that it be adjudged felony or trespass, according to the laws of the land heretofore used, and according to what the case may require.'" So that the offence must be clearly, without inference or deduction, within the act of Parliament, or it cannot be treason ; for the statute cannot be taken constructively. The charge of levying war can never be supported but by proof that war has actually been levied.

It is a rule well established that penal statutes of any kind should be *strictly* construed. In *Leach's Crown Law*, 234, in the case of The King *v.* Ann Guy, on an indictment for receiving stolen money, this principle was established. She was indicted as an accessory after the fact in receiving two guineas, she well knowing them to have been stolen.

The statutes of 3 William and Mary, chap. 9, sec. 4, and 5 Anne, chap. 31, sec. 5, say that "whoever shall buy or receive *any goods or chattels* that shall be feloniously stolen, knowing the same to be stolen, shall be deemed an accessory after the fact to such felony." She was indicted under this law ; but Mr. Baron Eyre said he was clearly of opinion that there cannot be an accessory after the fact for receiving money ; that money cannot be well considered as goods or chattels within the meaning of these acts. It might have been urged in this case that money was the same thing as *goods* and *chattels ;* that the two guineas were in fact goods and chattels ; that they were the same as any goods of that value ; and that, as stealing money came within the mischief certainly intended to be remedied by those acts of Parliament as much as stealing any goods and chattels, it ought to be considered as being within those acts ; that it was as

desirable to prevent the stealing of money as other property, and therefore to punish the receivers of stolen money as much as the receivers of stolen goods ; that no argument could apply to the prevention or punishment of the offence in one case that would not extend to the other. But the court said that penal laws must be strictly construed ; and as money was not expressly mentioned, it ought not to be construed to have been contemplated by those statutes.

These, and many other cases that might be adduced, show how extremely cautious and strict judges are in the construction of penal laws. This caution, which is laudable in all cases, is the more necessary where the whole power and influence of the government is opposed to a single individual.

The constitution of the United States is a compact between the United States and the people, binding and obliging themselves that they will not proceed against any person for high treason, unless he shall actually levy war against them or adhere to their enemies, giving them aid and comfort. The government is bound by this compact to protect the rights of the people. This compact, securing this among other rights to the people, is declared to be the supreme law, and binding on the judges in all the states, notwithstanding any state constitution or laws. It is the duty of every court, before which a citizen is prosecuted for this offence, to consider the evidence against him, and compare it with the constitutional provision, and see that he shall not be deprived of the benefit of it.

I come now to consider the question whether this court have a right to direct the jury in this case, or to consider and decide on our motion.

This is the first place where a doubt was ever expressed whether the court had a right to instruct the jury as to the overt act of treason laid in the indictment. It has not only the right, but it is a duty incumbent on it, to instruct them on the law respecting the overt act, but not as to the question whether it be proved at all or not, or proved as laid in the indictment ; for that inquiry is the exclusive province of the jury. The cases are very distinct. The right of the jury to decide on the facts can never be questioned. Their right to decide on facts when

blended with law is clear. But still it is equally incontestable that the court has the right to decide what the law, arising on the facts proved, is. The jury alone can decide the question whether there have been an overt act. The court only has the right to say what in law constitutes an overt act of levying war. The jury having this right have heard all the evidence on the part of the prosecution; and gentlemen insist that there was an overt act of war committed on Blannerhassett's Island. The court is applied to to instruct the jury that though they may believe all the facts which have been sworn to before them to be perfectly true and correct, yet they do not amount to an overt act of levying war. We say that the fact being proved by their own evidence, and it being impossible to deny that Colonel Burr was not at Blannerhassett's Island, but at a considerable distance, two or three hundred miles off, when the act said to have been done there happened. on the indictment on which Colonel Burr is now standing on his trial, no evidence can be admitted of facts that took place not on the island, but down the river. We pray the court, on general principles, to instruct the jury that though the facts given in evidence be fully proved to their satisfaction, yet in law they cannot be considered as an actual levying of war. For, whether the acts proved, or admitted to be true, amount to levying war or not is certainly a question of law. Levying of war, like other offences, consists of fact and of law. The facts are the proper province of the jury to determine; but the law is the proper province of the court. The jury are bound to decide, according to their sincere conviction of the evidence, whether the alleged facts be true; and the court is bound to state the law to the jury, and say whether those facts, if true, be criminal or not. The question of law may be brought before the court in three different ways: First. The jury may find a special verdict in which they may state certain facts, and submit the law arising on the facts thus found by themselves to the court. Secondly. It may be brought before the court by a demurrer to evidence; that is, the party may state all the evidence which has been brought forward, and admitting the truth of the whole of it, and other facts which the jury would have a right to infer

from those actually proved, he may call on the court to decide on the legal effect of the evidence thus adduced.

Chief Justice. — Was there ever a demurrer to evidence in a criminal case?

Mr. Martin. — Though it be not the practice, I presume that if there be no positive authority against it, there is no principle to forbid it.

Mr. Hay. — If a demurrer to evidence were admitted, what would become of the jury?

Here a desultory conversation took place. Mr. Martin observed that the law was general without exception, and that the general effect of demurrer to evidence was to withdraw the decision of the case from the jury, the facts being admitted by it; that the jury were bound by law in criminal as well as in civil cases; but he added that he must be candid enough to admit that the law, as generally stated in the books, was against him on this point, though he thought it difficult to give a good reason for the exclusion of a demurrer to evidence in criminal cases. He then proceeded: —

A third method is to admit that all the facts sworn to are true, and then to move the court to instruct the jury what the law is as to those facts; as in this case we move the court to instruct the jury on two principal grounds: First, that there was not a fact committed on Blannerhassett's Island that went to prove an overt act of levying war. The other ground of application to the court is, the inadmissibility of the testimony proving acts done elsewhere. The indictment charges him as an actor on the island; and the evidence of what was said or done elsewhere proves him to be an accessorial agent only. We insist that no evidence of acts or declarations which took place or were uttered after he left the island can be relevant testimony to charge Colonel Burr as an immediate actor on the island. There was no act of war levied at the mouth of Cumberland. But if war had been levied there, how could it prove that Colonel Burr was guilty of levying it on Blannerhassett's Island? I admit such evidence, under this indictment, would be contrary to the decision in the case of Vaughan; which we suppose he will admit to be law, as he said it was according to common sense. For if he were guilty of one offence in tak-

ing away the custom-house barge, that was no evidence to prove another: that he cruised in the Loyal *Glencartie* against the king's subjects; which was the offence laid in the indictment.

Gentlemen contend that conversations and acts of the accused elsewhere ought to be received in evidence, to induce the jury to believe it probable that he committed an act of treason on Blannerhassett's Island. We insist that they must prove *acts* on the island to support their indictment; and that no acts or declarations, confessions, or expressions of any kind elsewhere, can be admitted against him. The question is, whether Colonel Burr *committed an act of levying war on the island*, and not what he may have said or done elsewhere. Even if he had said fifty times that he was on Blannerhassett's Island, and guilty of an overt act of levying war, it could not be given in evidence against him. They must prove an overt act by two witnesses; but his own confessions, however often made, could not prove an overt act, and would not be received against him unless possibly in confirmation of an overt act previously proved by two witnesses. But I am of opinion myself, that there they could not be admitted even for that purpose.

But lest there should be a doubt in your honor's mind, from a part of the opinion of Judge Iredell, reported to have been delivered on the trial of Fries, I will read another part of that opinion to explain his sentiments. It is stated that he said "that after an overt act had been proved, they had permitted confessions of the accused, made before a magistrate, to be received as corroborative testimony against him;" and that he told the jury, "You will consider whether any part of this confession has not before been proved by two witnesses; if it has, it goes to corroborate what they say."

But Judge Iredell declares in the same opinion (*Fries's Trial*, 172), "that confessions out of court, if proved by a hundred witnesses, would not be sufficient to warrant a conviction; that danger is wisely avoided." In other parts of it he is stated to have said that confessions could in no event be admitted but in confirmation of what had before been proved by two witnesses. But I feel no difficulty in declaring that, in my judgment, the law is not

so; that such confessions cannot be evidence in the United States; nor do I believe that Judge Iredell, whose knowledge was so great, and judgment so correct, ever said so. I believe it to be a mistake in the report arising from the misconception or carelessness of the person who took notes of the trial.

But admitting that the opinion of Judge Iredell is what it is expressed to be, he confined it to the confession of the accused before a magistrate; for so the whole ought to be understood; which excludes all confessions or declarations made elsewhere. We must be confirmed in this opinion when we examine the subject further. The construction contended for would be a violation of the constitution, and therefore ought to be rejected. Our constitution requires proof of the overt act by two witnesses. If two witnesses do accordingly prove it, and the jury believe them, the confession of the accused will then be unnecessary; and if the jury do not believe the two witnesses, they must be ready to acquit the prisoner; and then the confession ought not to be received in addition to their evidence, and to support testimony which the jury would otherwise disregard; for otherwise the accused will be made the instrument of his own condemnation. I believe that it would be a direct violation of the constitution of the United States thus to aid the testimony of these two wituesses; for the obvious import of these words, "No person shall be convicted of treason *unless on the testimony of two witnesses to the same overt act, or on confession in open court,*" is that before any man can be convicted, an overt act must be proved against him by two witnesses worthy of credit, and whom the jury would believe on their own evidence alone. This is the only safe construction for the citizen, and is exclusive of all other confessions except those made in open court, and of all other testimony than of witnesses whom the jury will believe on their own credit.

If the testimony of any but two witnesses to be confided in by the jury be admissible, and the confession of the accused be received in confirmation of what the jury would not otherwise believe, the accused will be the instrument of his own destruction. If the jury believed the declaration of only one witness, and disregarded the testi-

mony of the other, and the confession of the accused were admitted as confirmatory testimony, the party would be the victim of his own confession. The jury might disbelieve both witnesses; but if it were then proved that he had acknowledged the offence, they might credit these two witnesses; so that in truth and reality they would condemn the accused on his confession only. Judges have never allowed confessions before magistrates in evidence to prove the overt act charged against the accused. It is quite out of the question.

We have the authority of Vaughan's case, not only to show that evidence of an overt act, not charged, ought not to be admitted (unless to confirm acts laid and proved), but also to prove that the court is the proper tribunal to declare the criminality of facts found or admitted to be true; and it is equally certain that it is the province of the jury to determine what facts are true. There can be no doubt, then, that it is the province of the court to declare what acts constitute a levying of war. The gentlemen in effect admit it. But in order to evade the effect of the admission, they eagerly resort to the opinion of the Supreme Court in the case of Bollman and Swartwout, as deciding the character of the crime of levying war, and as binding on this court and jury. By referring to that opinion and admitting it to be correct in stating what is a levying of war, they admit in the strongest terms that this court has the power, and that it is its duty, to declare what constitutes a levying of war; and consequently to decide whether the acts proved or admitted to have been done on Blannerhassett's Island did amount to an act of levying war.

Now, sir, whether testimony should be admitted as relevant to go to the jury has always been considered the province of the court to decide. No, say the gentlemen, the jury ought to hear *all* the evidence; that is to say, the court has not the right to decide what is or is not relevant testimony, or to reject that which is irrelevant. Sir, the very modest enthusiasts, who have advocated the rights of the jury in criminal cases, have never yet denied or controverted that it was the exclusive province of the court to determine the legality or relevancy of the evidence offered on the trial of a person accused; to

declare what is legal and proper evidence relative to the issue before them, and what is not. It is therefore its solemn and sacred duty to let no evidence go to the jury but what is relevant and proper. Judges who would hesitate to do so would little deserve to be on the seat of justice to administer the laws and dispense justice to their countrymen. It has never been controverted that it is the exclusive right of the court to decide on the relevancy and propriety of what should be submitted to the jury as legal evidence. The contrary has never been even so much as attempted to be argued. This doctrine has not only been recognized as familiar and well established by all correctly informed lawyers, but even the wildest enthusiasts for the rights of juries have admitted that the court is to decide whether the evidence brought before it be legal and pertinent to the issue which the jury are sworn to determine. The rights of the court are as well established and generally known as those of the jury. We have shown the distinction between them in a variety of instances ; and many more might be adduced were it necessary. The proper exercise of the rights of the court is as essential to the public good as that of the privileges of the jury ; as both are established for the promotion of the public welfare. And accordingly we have never heard heretofore captious and unfounded objections made to the just exercise of the acknowledged rights of a court. We have never before known the exercise of this just and necessary power made the topic of vehement declamation, and misrepresented as an odious and unwarrantable encroachment on the rights of the jury.

In the case of Ambrose Rookwood, reported in 4 *State Trials*, 661, and that of Robert Lowick in the same book, 718, the court was called upon by the counsel for the prisoner to declare its opinion whether there were two witnesses to prove the overt act against the prisoner ; "because," said the counsel in the former case, "if there be not two witnesses, as the law requires, we need not trouble the court with our evidence." Yet this excited no clamor, nor even a murmur, on the part of the counsel who prosecuted for the crown ; nor was any objection made by the court. It seems to have been considered

as a correct application made in the usual course of judicial proceeding. The court in the case of Rookwood did not decide that the facts sworn to by the witnesses were true; for they undertook no such thing. But it was admitted that two witnesses must swear to the overt act laid in the indictment; that the court must decide whether two witnesses had sworn to it; and when two witnesses had given evidence to that effect, the jury must decide whether their evidence be true or not. There were two men who had given evidence on the subject of the overt act; and then this application was made to the court, not to decide whether their testimony were true, but whether, admitting that what they said was true, it amounted to a proof of the overt act; and whether what amounted to an overt act were proved by two witnesses; because it is the duty of the court to see that what amounts in law to an overt act be proved by two witnesses. If there be but one witness, it is the duty of the court to tell the jury, "You cannot convict him, because there is but one witness to the overt act." The court has a right to decide, not whether the witnesses have told the truth, but, if there be but one, to instruct the jury that they cannot convict the accused; and if there be two who swear to the overt act, to tell them (as was done in Rookwood's case), "You are to judge of the truth of the evidence, and to decide on it according to your belief or disbelief of the truth of what has been sworn to."

But in this case we admit the truth of the facts sworn to by the witnesses; and we present to the court a perfectly distinct question: that though these facts be true, yet if, in the opinion of the court, they do not amount to an act of levying war, it ought to direct the jury that the party accused ought to be acquitted. Sir, it is the province of the court to decide on the *sufficiency* of evidence admitted to be true, and to direct the jury to acquit the accused when the evidence against him is clearly *insufficient* in law (as we contend to be the case here), and also when it is doubtful in the opinion of the jury.

It is a general principle that the court does not decide on the *truth*, but on the *sufficiency in law* of evidence; and the jury decide not on the *legal sufficiency*, but on the *truth* of it. To exemplify this doctrine, suppose an

action of trover and conversion. The party to whom the property belongs, and who has brought the action to recover damages for the loss of it, proves no act of conversion ; but he proves that he demanded it of the defendant, and that he has refused to deliver it. The court will tell the jury in the trial of the issue, " If you believe these facts, that the property belongs to the plaintiff, that he has demanded it of the defendant who has possessed it, and that he refused to deliver it, they are sufficient in law to authorize a belief that he converted it to his own use, and will justify you to find him guilty." This would be correct in the court ; because it is a legal principle that " a demand and refusal are evidence of a conversion ;" and the jury in this case would be warranted in finding a verdict for the plaintiff. The court in such a case would decide not on the truth, but the sufficiency of the evidence ; and the jury would decide not on the sufficiency, but the truth of the evidence. Here the rights of the court are evident and acknowledged, as well as those of the jury ; and if the jury were to disregard its instruction, the court would set aside their verdict, and grant a new trial.

So in the case of an action brought to recover a sum of money due on simple contract or on account : if the plaintiff prove that the defendant, at the time stated in the declaration, or within the time allowed by the statute of limitations if it were pleaded, had acknowledged the debt to be justly due, though he made no promise to pay it, yet on the trial of the issue on the promise, the court would tell the jury that as the plaintiff proved that the defendant had acknowledged the debt, it was sufficient testimony to justify a verdict in his favor ; and if the jury were to disregard the direction of the court, the court would set aside their verdict and grant a new trial. The court would be right ; because it is a rule of law that an acknowledgment of a debt is a sufficient evidence of a promise to pay it. When a party acknowledges a debt, the law implies a promise to pay it. In this case also the court decides on the *sufficiency* of the evidence.

So in an action of debt on a bond : if the plaintiff have not demanded the debt for twenty years, and there be no evidence of a payment or a promise to pay within that

time, the court, on the application of the defendant, would tell the jury, "If you believe it to be a fact that no demand has been made for twenty years, nor any payment or promise in that time, it is evidence sufficient to justify you in finding for the defendant;" and if the jury, disregarding the instructions of the court, were to find for the plaintiff, their verdict would certainly be set aside, and a new trial granted. In this case also we see the exercise of the general power. The court decides on the *sufficiency* in the law of the evidence adduced.

In a case reported by Coke, the question was, whether a great length of enjoyment, where the right could not have been originally acquired but by matter of record, were not sufficient for the jury to presume that there was a grant, although it could not be produced; and the court decided that such a long time of enjoyment was sufficient to authorize the presumption of a regular grant. In so doing, the court decided on the *sufficiency* of the time of possession to presume a right; that the jury *may* in such cases presume an original grant; and if they *may*, they *ought* to presume it in order to defend possession so long acquiesced in. And Lord Chief Justice Mansfield fully confirmed the doctrine reported in Coke, and decided that when there was such a long time of possession, it ought not only to be presumed that a grant had existed, but that everything had been done that should make the grant valid; and "that after twenty years' unimpeached possession of a corporate franchise, no rule ought to be granted against the person in possession to oblige him to show by what right he holds it." See 4 *Burrow's Reports*, 1462. The Winchelsea cases.

In these cases also the court decided on the *sufficiency* of the evidence.

In the cases cited by Mr. Botts, the principle is the same. In those cases it is established that in every criminal case the court is to decide what constitutes the criminality, and what amounts to sufficient legal evidence of it.

In the case of The King *v.* John Wilkins, reported by *Leach*, 422, the court determined as a question of law what were false pretences: that obtaining goods by false pretences from the servant of the owner, to whom they

were delivered in order to be carried to a customer who had purchased them, was a taking from the possession of the master; and if so taken with a preconceived design to steal them, amounted to felony. When the evidence was given in that case, the jury found the facts; but the case was reserved for the opinion of the twelve judges, because it was a question of law.

They say that we have omitted to make the objection in proper time, and have therefore waived the advantage. To this I will again answer, that whenever any testimony is given in any case, it is the proper time to object to it. *Whenever* any illegal testimony is *offered* against a criminal, *then* is the proper time to *oppose* it. So here we apply to the court with respect to the legal effect of the facts charged on Blannerhassett's Island; as all the evidence, which goes to prove acts on the island, proves that they were not acts of war, and that he was absent at the time. We therefore call on the court to say whether they amount to levying of war; and whether the evidence offered against the accused be relevant to the charge laid in this indictment.

So it is the province of the court to decide what are false tokens, as appears from 2 *Strange*, 1127, where the accused was convicted for procuring by false tokens a promissory note, under pretence that he would bring money for it; and the judgment was arrested because the indictment did not specify the false tokens; which clearly proves that what amounts to a false token is a question of law; but the jury are to decide the question whether the accused used such tokens or not. In like manner it is the province of the court to determine what constitutes the crime of profane swearing. In 1 *Strange*, 497, it was determined that the particular oaths must be set forth in a conviction, that the court may judge of their criminality; and that what is a profane oath or curse is matter of law.

In like manner the court decides what acts amount to unlawful gaming. See *Burrow's Reports*, 1078, 2018. But in these cases the truth of the evidence must be submitted to the jury. They would have the power of deciding whether those acts were done or not; but it would be the duty of the court to say whether they amounted to unlawful gaming or not.

Mac Nally, 547, was quoted with respect to the power of the court to decide the criminality of acts found or admitted. I have attended to the observations of the gentleman who spoke last on the side of the prosecution, on this and several other points; the correctness of which I shall endeavor to examine. Indeed, the gentlemen have freed me from the necessity of examining many authorities in their favor, because they have produced but few; and these they have repeated over and over again, like the notes of the cuckoo. The violation of the rights of juries is the burden of their song, the constant theme of their declamation.

The authority from Mac Nally was produced by my respectable friend to show that the court is the judge of malice when facts are found (or admitted), and not the jury. It was the case of Major John Oneby (reported in 2 *Lord Raymond*, 1485, and 2 *Strange*, 766), who was indicted for the murder of William Gower. The jury stated all the facts in a special verdict; and the principal question arising thereon was whether there were sufficient time for his passion to cool or not. And notwithstanding the observation of my friend who prosecutes, the case fully warrants what Mr. Botts said: "Raymond, J., after argument on the special verdict, laid down this proposition, to *which all the judges agreed: that the court are judges of the malice, and not the jury;* and that the court are also judges of the fact found by the jury, whether, if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not. It was a case where the parties, notwithstanding the violent and improper conduct of Oneby, were admitted by Gower on his death-bed to have fought fairly: "that he had received the wounds in a manner among swordsmen called fair." It was a case where the affections of the human heart and every feeling of the soul were in favor of the prisoner, and in which it was most painful for the jury to give an opinion to convict him. No doubt they would have acquitted him entirely, or found him only guilty of manslaughter, if they could have done so conscientiously. Being unable to do so, they devolved the responsibility on the court by finding the facts in a special verdict; and the court determined that there was malice, because there was time for the passion to cool.

There has been a case stated by Mr. Botts, which was determined by judges appointed under the government of Virginia, in which the same principle was fully recognized and enforced. They were not of that class of judges who might have been supposed to have a disposition to encroach on the rights of juries; they were of such political sentiments as would secure them from the gentleman's suspicions on that subject; yet neither popular clamor nor professional declaration prevented these judges from pronouncing that correct sentence of the law which became men of independence and integrity.

They determined in substance the same principle that is here laid down in Mac Nally. They decided that as the party, provoked by the brutal conduct of the deceased, had had sufficient time to reflect, and for his passion to cool, the provoking circumstances should not be given in evidence in extenuation of the murder; which was in principle adjudging that he must have killed him with malice prepense.

[Here Mr. Botts again briefly stated some of the circumstances in Gatewood's case; which see before. Mr. Martin again read the authority from Mac Nally, and endeavored to prove that the decision in Gatewood's case was merely the same in effect; that in both cases the judges performed a most important duty, and judged of the malice; and that it does not appear that either decision was complained of as an encroachment on the rights of the jury. He then proceeded.]

Mac Nally further takes notice that Foster says that in "cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict; but when the law is clear (as we presume it is in this case), the *jury, under the direction of the court in point of law,* matters of fact being still left to their determination, may, and, if they are well advised, will always find a general verdict *conformable to such direction.*"

According to this authority the court will tell the jury, "If you find such and such facts to be true, then you will find that the party is innocent or guilty on these facts, according to the law which the court has explained to you." This is precisely according to the general and

usual course of proceeding in criminal prosecutions. Here, then, is the authority of which my respectable friend on the other side could not discover the application, and which he says cannot be reconciled to itself. It is as clear as the light of day. It is so plain that a school-boy who spells his *a b* — *ab* must comprehend it. Mac Nally says, it proves in the clearest manner the right of the court to judge of the malice, or, in other words, to determine the criminality of facts found or admitted.

Here a desultory conversation ensued among the counsel.

Mr. Hay declared that it was manifest that the gentleman had not understood him, or he would not have made such remarks; that he seemed to vary the ground of the motion as originally made by Mr. Wickham; that the motion was not that the court should instruct the jury as to the overt act being or not being committed on the island, or as to what constituted an overt act of levying war; but to exclude the testimony of certain witnesses from being heard as irrelevant; that with respect to previous malice, although the court might declare what constituted it, yet the jury were the proper tribunal to inquire and ascertain, from all the circumstances of each case, whether it existed or not; and that the authority of Mac Nally did not prove the propriety of taking from the jury the decision of facts.

Mr. Wickham explained. We object, said he, to the introduction of testimony relating to acts at the mouth of Cumberland or elsewhere out of this district as irrelevant and illegal. We contend that there has been no evidence given of an overt act in Virginia, where the indictment charges it; that acts committed at the mouth of Cumberland are triable, under the constitution of the United States, only in that state and district, and cannot be received as evidence to prove acts alleged to be done in Virginia.

Chief Justice. — Mr. Martin also argued on the propriety of instructing the jury as to what constitutes an overt act of levying war, and the effect of the acts proved to have been committed on the island.

Mr. Wickham. — We not only object to the admission

of evidence of facts out of this district as illegal and irrelevant, but we insist on the insufficiency in law of the evidence of facts in this district. We say that there is no evidence of the presence of Mr. Burr with the persons who committed the acts on Blannerhassett's Island. We call on them to prove it if they can. If they cannot prove it, we say that there is not a single tittle of evidence that can affect him; that those acts of others on the island are not treasonable; they do not amount to an overt act of levying war; and if they were treasonable, he is but an accessory before the fact; and therefore they must prove the guilt of the principal by the record of his conviction before they can charge the accessory.

Mr. Martin then resumed his argument.

If the gentleman had permitted me to go on further, he would have had no reason to complain of me for misunderstanding him. It is possible I may have misunderstood him; but I believe I did understand him.

Sir, there are two distinct questions before the court which were fully opened by Mr. Wickham, as I understood that gentleman. We say, first, that testimony of what happened since the party left Blannerhassett's Island is irrelevant to our having levied war on the island. This is a distinct proposition. We say, secondly, that, admitting what is proved on the island to be true, it does not amount to levying war. They charge us with having committed an act of levying war on Blannerhassett's Island; but they now wish to give evidence of what happened down the river and out of the State of Virginia. This cannot be relevant to prove facts charged on the island in the county of Wood. So that in fact there are two questions before the court: the one as to the *relevancy* of the testimony which they *wish to introduce*, and the other as to the *sufficiency* of the testimony *already introduced*. We have endeavored to consider them distinctly; and we have been answered only by declamation.

The gentleman has suggested that the authority adduced from Mac Nally from the case of Major John Oneby did not establish the position contended for. What was that position? *That the court are judges of the malice and of the facts found by the jury.* For this

position there was no necessity to produce authority. It was so plain in itself and so perfectly well known, that not only every tyro in the profession, but the very child who knows his alphabet, may understand it. How does it apply to the criminality or innocence of the acts committed on the island? That correct rule of law proves that though the jury are to find the facts in every case, yet the court is always to judge of the criminality or illegality of all acts found by a jury or agreed by the parties. The jury there presented the facts to the court in a special verdict; and the court decided that there existed malice; that as the prisoner had had sufficient time to reflect and for his passion to cool, he was guilty of murder.

But said the gentleman, "If he had looked a little further into Mac Nally, he would have found him declaring that the jury may find a general verdict as to law and fact.

The next paragraph to which he alludes, and which is in these words, "In cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict; but where the law is clear, they *may, under the direction of the court in point of law, matters of fact being still left to their determination*, and if they are well informed, *will always find a general verdict conformable to such direction*," is no more than this: that the court may tell the jury, "You will consider all the facts in your own mind. If you find such and such facts true, you may find a general verdict of guilty against the prisoner. If you find such and such other facts true, you will then find him guilty only of manslaughter." Is there anything in this that interferes with the principle stated before by Mac Nally? It is perfectly consistent with it. There is no contradiction. He says that it is the duty of the court to declare what the law is, and to instruct the jury that they ought to find according to the evidence produced before them and the law explained to them. Thus, in this case, it is the duty of the court to instruct the jury that if the testimony be as we represent it, if there be no further evidence of acts on the island than what have been already adduced, he cannot be guilty of an overt act of levying war; because the acts hitherto proved do not constitute in law

an overt act of war. But he has no dependence on authority. These principles of the common law, which we so highly regard, and from which we deduce many arguments, the gentleman considers as trash, as mere rubbish, unworthy of his attention. His confidence is only in a new kind of forensic code called the system of common sense, according to which he supposes there were acts of war levied on the island. Sir, nothing is more uncertain than *common sense*. There are some plain leading principles of it in which we all agree. But when it is to be applied to particular subjects, and especially to legal construction, to judicial interpretation according to every man's conception, you will find there are as many different kinds of common sense as there are different features in the human face.

But though I cannot concur with the gentleman in his new system of jurisprudence, I will so far agree with him as to admit that the judges in Great Britain have sometimes acted on principles the most iniquitous, and as unjust and oppressive as those which are now contended for. They have established in Great Britain a system of evidence of the most oppressive and tyrannical kind, by an unprincipled perversion of laws, which were passed to secure the subjects of that country against persecution. The law required, for the safety of the subject, that the overt act should be proved by two witnesses. But they have adopted the principle that if the overt act be proved in the county where laid by one witness, another act of the same kind of treason may be proved in another county by another witness. It would be bad enough to allow in evidence an act not charged even in the same county where one act is laid. But it is allowed in a different county. What is the consequence of this absurdity? It is like the opinion of Judge Iredell (if he ever expressed such an opinion), that confessions or other testimony might be let in to support insufficient testimony — the evidence of witnesses not entitled to credit; or to prove what was already sufficiently proved, and required no confirmation! and thus a law, which was intended to secure the liberty of the subject against oppression by false testimony, is evaded; and the subject is exposed to destruction by perjury. It is manifest that the intention

of the law in requiring two witnesses to establish the overt act was that both should prove the *same* act; that one should confirm the evidence of the other; and that the chance of danger by perjury should be diminished. Is not the absurdity of such a construction as manifest as its tendency is dangerous? I ask, in the name of the God of heaven, what security is afforded by requiring two witnesses to prove the overt act, if it be sufficient to prove one act in the county where the offence is laid by one witness, and another act in another county by another? What safety is even produced if two acts be allowed to be proved in the same county but by two different witnesses? The object of the law was to give further security against false accusations by requiring one witness to corroborate the testimony of another. But by this construction the object is completely frustrated. There should be no evidence admitted of an overt act in a county different from that in which it is laid. I ask, How would the court act if the prosecutor were to come forward and attempt first to prove an overt act not laid in the indictment, in a county not stated in the indictment? Would it not tell him, "You must first prove the overt act laid in the indictment, before you can be permitted to introduce such evidence?" Does not this, then, forcibly prove that the court must in the first instance decide whether the overt act laid in the indictment be proved or not? What is meant by this rule? The books say that the jury are to determine whether the witnesses have sworn to the truth; but it devolves upon the court to say whether the overt act laid have been proved by two witnesses admitting the jury to believe their testimony to be true. If the court think that two witnesses have proved the overt act charged, admitting what they say to be true, and if the jury believe what they allege to be true, then sufficient evidence of the overt act has been given; more is unnecessary; and there is an end of the trial. Why should it persist, and let in other testimony, if the law mean that the overt act is to be proved by two witnesses? If the constitution only require satisfactory and legal proof by two witnesses, why should more be demanded? On the other hand, if only one witness prove the act laid in

the indictment, or if the jury do not believe the testimony adduced, though given by two witnesses, there ought in like manner to be an end of the trial; and the accused should be acquitted. If proof of the overt act by one witness be insufficient, how can that insufficient evidence be confirmed or rendered sufficient by the proof of another overt act equally insufficient? Yet this absurdity results from their arguments: that one insufficient and illegal act is legalized and confirmed by another act equally insufficient and illegal. The grammatical as well as the legal and rational construction is, that the same act which is laid should be established by two witnesses. It speaks of the overt act in the singular number; and that it must be proved by two witnesses. According to this rational construction, our constitution, intending to prevent such a perversion of manifest intention, requires expressly that *there should be two witnesses to the same overt act.*

The court must judge how the facts laid are proved, and, when the jury are going to retire, it instructs them to this effect: "Gentlemen, if you find the facts laid in the indictment to be true, you cannot disregard the evidence, but must find the prisoner guilty; but if you disbelieve the evidence of the witnesses who swore to the overt act laid in the indictment, you must find a verdict of acquittal."

I hope to be excused for being thus particular in explaining the absurdity of the construction adopted by the judges in Great Britain (before the act of William III. passed) in not requiring the testimony of two witnesses to the same overt act, and suffering in its stead what affords no security against unjust and false accusations: the proof of one act by one witness, and of one another by another, even in a different county; since the evidence of one does not confirm or corroborate that of the other. But this construction neither affects the power of the court nor the rights of the jury. The inconvenience has arisen from the courts in Great Britain leaning to gratify those in power, and from whom they derived their appointments, and torturing the law into a meaning quite different from that which was intended.

But poor *East* has been caught napping by the gentleman. He disapproves of what this writer says in page 97,

and insists that he has mistaken the law. The subject which he discusses is a general conspiracy against the life of the king; and the inquiry is, how far the act of one conspirator is evidence against the others. His words are, "But when the connection between the parties by one or other of the means above mentioned is once established, *of which the court must in the first instance judge*, previous to the admission of any consequential evidence to affect the prisoner by the act of others to which he was not a party or privy, then whatever is done in pursuance of that conspiracy by one of the conspirators, though unknown perhaps to the rest at the time, is to be considered the act of all." Here it is expressly stated *that the court must in the first instance judge* whether the connection between the parties engaged in the conspiracy have been established, before it will admit evidence of the acts of the other conspirators to be submitted to the jury against the party on trial. Not that the court is to undertake to give a verdict in the cause; but it decides whether such evidence have been given to the jury as establishes the connection between the parties. If the court think that the evidence is sufficient to prove the connection between the parties, then the testimony which is offered to the jury of the acts of the other conspirators is admitted against the party prosecuted. But if the court do not think the testimony respecting the connection between the parties is sufficient to establish that connection, then the court rejects the evidence which is offered to the jury to prove the acts of other parties against the accused; and the court will tell the jury, of course, that they ought to find the defendant not guilty. If the court have the right to decide whether sufficient evidence have been adduced to establish the connection between conspirators, it has an equal right to determine whether sufficient evidence, if true, have been laid before the jury to establish the overt act.

But the gentleman insinuates that *East* was napping, and that he has involved himself in contradiction. I have read with attention the two passages from which this inference is deduced, but can find nothing to justify it. I have just cited the first passage. The second is in page 125, and in the words following: "But after proof

of an overt act in the county in which the treason is laid, evidence may be given of any other overt acts of the same species of treason in other counties."

It may be that my common sense is different from his common sense; but I can discern no incongruity, nothing repugnant or improper in the observations of East. They are written, it is true, in plain English; but possibly the gentleman, as he says himself, does not understand them; and possibly they are not so contradictory as he may think them. Sir, East is not napping. The latter passage is a practical explanation of, and perfectly consistent with, what he had said before. He says that there must be *proof* of the overt act before other testimony is let in.

The same doctrine is fully explained in 2 *Mac Nally's Evidence*, from page 616 to page 633. His second rule "of evidence admissible to support an indictment for a conspiracy of high treason" is precisely what is stated by East: that "the existence of a conspiracy being proved, the act of any man engaged in such conspiracy, though not on his trial, is evidence to criminate those with whom he co-operated, though they are not on trial."

In all the cases mentioned by Mac Nally of prosecutions against several persons for high treason, when the acts of other conspirators were admitted against the person on trial, the connection between the parties was *first* proved; and the court in every instance judged of the previous proof of this connection, and from the nature of things it must be so.

In the case of The King against Hardy for high treason, the counsel for the crown proposed to read a letter upon the principle of its being a correspondence between one of the persons proved to have been a party in the conspiracy and another person at a distant part of the kingdom, likewise proved to be party in it. It was a letter from Martin to Margacot, at that time in custody, &c. It was stated to be in terms calculated to excite the northern people, by the doctrines which had been disseminated in London. It was strongly objected to; but the paper was read. Let us see whether this practical commentary agree with the text. As far as I can judge, there never was a more perfect agreement between a text and its

commentary. Why was this letter admitted in evidence against Hardy? Because evidence had been given before to prove a connection between him and the other parties to the conspiracy, especially the writer of the letter and the person to whom it was addressed.

On the same principle, a letter addressed from a society in Sheffield to the prisoner, found in the possession of Thelwell, was admitted in the same trial against the prisoner. There are several other decisions on the same principle noticed by Mac Nally on the trials of Hardy, Tooke, &c. Did not the court first decide on these cases that there was sufficient evidence adduced to prove a connection between the parties before it admitted testimony of the act of others to be given against the person on trial? And this evidence of their connection being thus given, the court then received before the jury evidence of the acts of other conspirators. If it had not been of opinion that the previous evidence did prove this connection, it would not have permitted the acts of one person to be given in evidence against another.

Do not these cases afford a complete practical explanation of the principle laid down by East, that "*the court are to judge in the first instance of the connection between the parties being established previous to the admission of any consequential evidence to affect the prisoner by the act of others?*" When I say that the court decides that sufficient evidence has been given to prove a connection between the parties, I do not mean to say that it determines the facts to be true, but *only that such evidence has been given, as, if true, would establish the connection between the parties.* It does not decide on the truth of facts, but that, if true, they establish the connection between the parties; and then it lets in the additional evidence to the jury. If the judges do not believe the connection between the parties to be proved, they will not let the subsequent testimony go to the jury. But if they believe their connection to be proved, then they will permit the other testimony to be submitted to the jury, and tell them, "If you believe these facts to be true, you may find him guilty, but otherwise you must find him to be innocent." Sir, I find the practical commentary to be most undoubtedly a correct exemplification of the text.

As to the general principles which have been discussed, I shall make but a single additional observation; after which I shall take some notice of some *observations* of the gentleman; for I cannot call them *arguments*. If the court or jury entertain any *doubt* on any question, they should decide in favor of the accused. If the jury have any reasonable doubt of the facts, or if the court have any reasonable doubt of the law, they ought in every principle of justice and humanity, as well as of established authority, to determine for the prisoner. The judge or juror, who had any rational doubt of the law or facts, would violate every sacred duty to his country and to his God, if he did not decide in favor of the party whose life was at stake.

The gentleman observed pretty early in his argument that Judge Chase was not impeached on account of the opinion that he had given, but for his improper, intemperate, and persecuting conduct on the trial. It was for strictly and impartially expounding the law, regardless of parties or consequences; for doing, in short, what this court is now called upon to do. I do not know whether it were intended by this observation that your honors should be apprehensive of an impeachment in case you should decide against the wishes of the government. I will not presume that it was used with that view; but it is susceptible of being so misunderstood, however innocently or inadvertently it may have been made.

Those who argued against Judge Chase on his impeachment did not attempt to dispute the correctness of the opinion which he had given on the trial of Fries; yet it was an opinion that was dissatisfactory to Congress and the people of the United States. What was the persecuting disposition manifested by the judge of which they complained? It was what they termed an encroachment on the rights of the jury and forestalling the opinion of the court on the law in order to prevent the acquittal and to take away the life of poor Fries. It was for rigidly deciding against the person accused.

Are you called on now to do any act which may be considered as tyrannical in taking from the prisoner the chance of an acquittal by a just and lawful defence? Are you called on to deprive the accused of the benefit

of counsel and of a fair trial by a prejudged opinion? for that was the charge against Judge Chase. It may be unnecessary to mention it; but the motives which induced that prosecution are well known, and could be clearly proved. Though Judge Peters concurred in opinion with Judge Chase on the points of law, yet they did not charge him with any high crime or misdemeanor. The time that elapsed between the commission of the pretended offences and the prosecution and other circumstances justify the conclusion that because of his talents, firmness, and political opinions, he was selected to gratify the vengeance of those who were in power.

We do not call on the court to prevent the prisoner from having the chance of being acquitted, by depriving him of the benefit of counsel. We do not wish the court to deprive the accused of the benefit of a fair trial.

But gentlemen say that we call on the court to answer to a question of fact. We do not call on it to answer to any question of fact, but to hear our motion, and not to refuse us that attention to which all parties are entitled. If the law be for us, it is your sacred and your sworn duty to pronounce it in our favor. We call on you to say, admitting the facts to be true, that there was nothing done on the island that amounts in law to levying war; and to prevent the introduction of irrelevant testimony. We do not wish you to determine any fact, but to determine the legality, propriety, and relevancy of the testimony offered to be brought before the jury, and the sufficiency of the acts already proved.

Gentlemen ask us, Is it possible to find a case where the trial was stopped in the middle, and the evidence prevented by the court from being laid before the jury? But that is not the question before the court. But exclusive of the insufficiency of the acts proved it is this: Shall irrelevant testimony be heard by the jury? Is it not the duty of the court to exclude testimony which we can demonstrate to be illegal? The indictment charges the accused with having levied war in the county of Wood, in Virginia. To support this charge they attempt to prove acts done not in Virginia, but at the mouth of Cumberland, in another state! We therefore object to, and wish the court to stop, this irrelevant testimony.

When can this question be considered but during the trial? It cannot be otherwise. The most proper time to except to illegal testimony is when it is offered. It may be too late afterwards. It would be irregular and improper first to acquiesce in hearing, and then to object to the testimony.

The gentleman has said that in the whole history of jurisprudence he has not known such a novelty as challenging the grand jury. I can reply that I never knew so many novelties as since I came to Virginia. But if it be a novelty to him, it is because the gentleman has never made himself master of the subject. If he had examined Hawkins's *Pleas of the Crown*, even in the index, he would have found that this objection must be allowed: that grand jurors may be challenged. It is there briefly stated that "any person under prosecution may, before he is indicted, challenge a grand juror, as being outlawed for felony, &c., a villain, or returned at the instance of the prosecutor, or not returned by the proper officer." The authority, when duly examined, will show that a grand juror may be challenged for *good cause* as well as a petit juror.

In the American *Museum* it will be seen that in a cause that came before Judge Grimke, in South Carolina, it was expressly decided that the counsel of the accused have a right to challenge for good cause all or any of the grand jury. It is acknowledged to be correct doctrine by elementary writers in England, and so decided in this country. So that it is no novelty, either in England or America, to those who have been in the habit of closely and minutely examining the law. But gentlemen felt such zeal and ardor in the cause, and were so anxious to defeat our motion, that they did not advert to what they said in opposing it, and acted as if they did not comprehend its object, — that it was a usual and regular motion that irrelevant testimony should be cut off.

But gentlemen say that this question has been already decided by the court. When and how has it been decided? Sir, there has been no determination of the court on these points. It has only determined that the counsel for the prosecution might proceed in the introduction of the evidence in his own way; but certainly

the evidence which he was thus to introduce must be legal. I do not believe that the court meant to say that he might adduce any evidence he pleased, whether relevant or irrelevant.

But their sheet-anchor is this: that the jury have a right to give a general verdict upon the law and the fact. I acknowledge that they have the physical power to decide, as they have in all cases whatsoever. But the court has the right, and it is its duty, to instruct them what the law is; as, for instance, to instruct them that in all criminal prosecutions the accused shall be tried in the state and district where the offence has been committed. The jury have not a right to violate this constitutional provision, and say that an overt act committed out of Virginia was done in Virginia; nor have they a right, notwithstanding their power, to decide against the instruction of the court on the law. Will it be said, because they have the power, that they have the right, to disregard the opinion of the court on the law; or that the court ought not to waste its breath in giving instructions which the jury have the power of counteracting? The jury in strict right are bound to regard the statements of the court with respect to the law. If this be not the opinion of the gentlemen, why do they object to the court instructing the jury? Their objections to the instructions being given to the jury certainly admit that, if given, those instructions ought to be regarded by them. Suppose the jury were to find against what the court instructed to be the law, what would be the remedy? In all civil cases the court grants a new trial immediately; and in all criminal cases, if the jury find against the criminal, the court can give a new trial. But if the jury, on principles of humanity, dare to go in opposition to the opinion of the court, and acquit the prisoner, the court cannot give a new trial. A verdict favorable to the accused has never been set aside. Being in favor of life, the doctrine has ever been held sacred. No judge has ever dared to grant a new trial in such a case, and bring a man *twice* to answer at the hazard of his life for the same *crime*. This being the clemency of the law, will the gentleman stand here and contend before the jury that they ought not to regard the opinion of the court if in favor of hu-

manity? If he were to do so, his conduct might, perhaps, at the moment be applauded by a certain part of the community whose feelings have been roused, and whose minds have been highly inflamed against the gentleman for whom I appear; but he would find it in a little time to be the most unpopular act of his life. He would find himself loaded with the detestation of his country for the inculcation of such inhuman doctrine.

But the gentleman says that no judge in Great Britain has ever attempted anything of this kind; and that if any judge had done so, he would have incurred the indignation of his country. Sir, every judge in Great Britain has attempted, and has, whenever applied to, even in common cases, instructed the jury that if they believe the facts stated to be true, the law is so and so. The judges in Great Britain, whenever called upon, decide whether evidence offered be legal or not; and if it be irrelevant do not permit it to go to the jury. Illegal evidence is never permitted to go to the jury. We only ask (what is the duty of the court to grant) the rejection of irrelevant testimony. This never drew indignation of any kind on any judge. When the indignation of his country has been roused against a judge, it has been when he forced a jury to find against a prisoner. Unmerciful, inhuman decisions have frequently and justly excited popular indignation; but the people must indeed have been savage and degenerate where judgments in favor of mercy could have this effect.

But the gentleman feels much for the rights of juries, but has no sensibility for traitors! Sir, what does he feel for the rights of juries? What are their rights? Have our courts no rights? If they have, are they to be disregarded? If so, let us put an end at once to our courts, and let juries decide in all cases, without the aid of judges, on the guilt or innocence of persons accused. Is an encroachment on the rights of the jury, or a violation of those of the court, correct in the execution of a law or the prosecution of a party accused? The court and jury are two distinct branches or parts of the same tribunal; and both equally essential to the due administration of justice. It is the duty of the court to declare the law, and of the jury to decide the facts. The law arises out

of the facts under the direction of the court. It is the sacred duty of the court to decide every question of law submitted to its consideration, or arising in any case tried before it.

But he feels no solicitude for the fate of traitors. No more did the bloodthirsty Jeffreys. That sanguinary and cruel judge treated every man who came to be tried before him as a traitor. He thought none innocent, and condemned all he could. But the man must be lost to all humanity who would not drop the tear of pity whilst he wielded the sword of justice. But this inexorable tyrant had no feeling, and regarded no principle. Sir, does not the gentleman know that any man, however innocent, may be hunted down as a traitor? Does he not know that any man may be oppressed by a charge brought against him before a court and jury, without any knowledge of the facts of which he is accused? Is not the case of such a person sufficient to excite solicitude in the bosom of every person? Does he suppose that no man can be charged who is innocent? Does not the law presume him to be innocent till he be convicted by the court and jury? He ought not to be proceeded against if he be not a traitor, but an innocent man. Ought not the court therefore to feel the utmost solicitude to prevent the oppression of innocence?

He wishes to introduce all the evidence before the jury; and we wish to prevent it. I have no doubt but he wishes it; but if his wish be wrong, it is the sacred duty of your honors to prevent it from being gratified, and to reject impertinent and irrelevant testimony on a trial for life and death. The gentleman has himself recognized this principle. He did observe that when evidence is brought forward, the court will restrain it, if impertinent to the issue tried before it. This is the very position for which we contend. It is too clear to admit of controversy, and decisive of the question before the court. The evidence of transactions out of this state does not establish what was done on Blannerhassett's Island; and therefore the testimony which they offer does not apply to the issue taken in the charge in the indictment.

He has told us that, when he argues on the ground of legal decision, he stands on tender ground; but when he

argues on principles of common sense before the court and jury, he feels himself erect and firm on such ground that he cannot be shaken. I do not know that these are his words; but this is the substance of what he said. He considers a reference to authority as a useless waste of time, because he says that if forty thousand authorities had decided the principle in our favor they ought not to be regarded. What do these authorities prove? No more than that judges answer questions of law and juries examine facts. Do we wish to break this just rule? Why are courts of justice established, and judges placed in the chair of justice to administer the law, if their knowledge and information are to be totally useless to the public? When the gentleman speaks thus, he invites the jury to encroach on the province of the court. We wish no encroachment on the rights of the jury. The rights and duties of both are separate and distinct, and neither should encroach on the rights of the other; for the preservation of the rights of both is essential to the public good. Why are judges selected of the greatest understanding and integrity, and placed in the chair of justice? Why are they placed in an independent situation, out of the power of the government on one side and of of popular frenzy on the other, but that they might decide impartially, and not be under the influence of the government, or intimidated by the frantic rage of the populace?

I shall submit one observation in another point which I had like to have forgotten, and make a candid representation of what Mr. Wickham said about Blannerhassett. None of us said that we considered Blannerhassett to be guilty, as has been unjustly insinuated. He only stated what the law was. He denied that any person was guilty; alleged that no overt act was committed by any person; but still insisted on the legal consequences of the absence of Colonel Burr. I believe Blannerhassett to be as innocent as the books or instruments of music to which he is said to be so passionately addicted.

But the gentleman expressed, with great zeal and pathos, that he pledged his own life, and the lives of his children and posterity, on the propriety of the doctrine which he advocated; that if they avoid conspiracies, that

if they be innocent, they will be safe. Most delusive doctrine! It does not follow that because a man is innocent he will be safe. The experience of all ages forbids so extravagant an expectation. Without a rigid adherence to those rules which have been wisely established for the protection of innocence, there never can be safety. I pray God that neither his own life nor the lives of his children or posterity may depend on the propriety or permanency of his doctrines. He should reflect on the instability of human affairs, the vicissitudes of fortune, and the mutability of popular applause. Permanent security can only result from a wise system, calculated for all times, and to promote the happiness of all parties. If *he* be *now*, "in the *full tide* of successful experiment," in the enjoyment of the approbation of his country and government, so *was*, *not long ago*, the gentleman whom I advocate. He was as highly distinguished by the kind favor of the people as he could be by their suffrages.* It was, then, incredible that their favor should so soon be changed by the calumny and rancor of party into the most malignant hatred. The gentleman may now think himself perfectly safe, by the prevalence of his party and principles; but the day very possibly *may* come when he may find himself as obnoxious as the gentleman whom I defend. He may possibly by the same means, the malice, injustice, and violence of party spirit, like my client, not only find himself reviled and calumniated, but his dearest friends abused and persecuted. I should be sorry that such prediction should be realized with respect to any gentleman; but such are the natural consequences of his own pernicious doctrines; and these we oppose. It is for the security of innocence that we contend. If innocence had never been persecuted, if innocence were never in danger, why were so many checks provided in the constitution for its security? We know the summary and sanguinary proceedings of former times, as recorded in faithful history. In those times of oppression and cruelty they never troubled courts or juries with

* Alluding to his having had an equal number of suffrages with Mr. Jefferson for the presidential chair; which rendered a choice between them by the House of Representatives of the United States necessary.

their accusations, proofs, and legal forms, but declared the intended victim guilty of treason, and proceeded to execution at once. We wish to prevent a repetition of those scenes of injustice and horror.

The gentleman expressed some sentiment to prove that courts should be extremely cautious not to encroach on the rights of juries.

If I understand the gentleman, he means this: that the jury might encroach one thousand miles on the rights of the judges, rather than that the court should encroach a hair's breadth on the province of the jury. But what is law and common sense? That the court shall decide the law, and the jury the facts upon the evidence. We wish to exclude the evidence which we deem illegal, and prevent an innocent person from being put to death to gratify vengeance, iniquity, injustice, or worse. If it were left to every jury to decide according to their own particular impressions or views of common sense, without the aid of the court, and regardless of law, there would exist the greatest diversity, uncertainty, and insecurity. I hope this argument will not be considered as a mark of disrespect by this jury. They are gentlemen of sufficient information to know that property, life, and liberty depend on the support of the pure principles of law and justice, which establish and discriminate between the power and duties of courts and juries. If we were to be without landmarks, and common sense only were to be the rule of decision, would not the consequence be that everything would be afloat, and what would be innocence one day, would be guilt another day?

One observation of my friend, Mr. Wirt, I cannot pass over. It is the only one uttered by him to which neither of the gentlemen associated with me has made any reply. Judges, said he, are men, and mingle in the politics of their country. It is impossible for human nature to do otherwise. Their very patriotism will subject them to the influence of party spirit. Hence he infers that this party spirit will render the judges partial; that they will favor only men of their own party; that a man of a different sect, however innocent, will be persecuted and sacrificed; that some bloodthirsty Jeffreys will send him

to the gallows. Sir, I pray the gentleman to answer me. Do not jurors mix with the public as much as judges, and even more? Are they not subject to the same feelings and political bias? Does not the gentleman himself mix with politicians, and take a most active part with them? Is he free from all political attachments? If he be not, how can he expect others to be so? Is it not probable that jurors will come under the influence of that political partiality which the gentleman described to the court, when he was arguing the question, "Who is to be considered an impartial juror?" The gentleman then told us that it was impossible to find such impartiality. Every citizen reads the newspapers. He sees therein the charges against the accused. He would not have "the soul of a man," nay, not the soul of a mosquito, if he did not take a part in what was going forwards, and an interest in what concerned the welfare of his country. It cannot be doubted that jurors are as fallible as judges, and as liable to be influenced by their feelings and passions, by what they see and hear. Let us examine how this inference will apply in the present instance. The bloodthirsty Jeffreys had a victim at the bar whom he was determined to sacrifice. He gave instructions to the jury that they ought to find him guilty. But the jury considered it to be a base, infamous principle of persecution, and found him innocent. Those who wish the jury to have cognizance of the fact and the law, desire it for this honorable purpose, that the jury may step between a bloodthirsty judicial tyrant and an innocent victim. They wish it for the protection of the accused from oppression. Let us reverse this picture, and suppose a court, actuated by the purest principles of justice, wishing the accused to be acquitted if innocent, and punished if guilty. The judges explain the law to the jury, and tell them, "If such and such acts be proved, and you be satisfied with such proof, then the law is so and so, and you ought to find accordingly; but if the testimony be contrary, the law is otherwise, and you ought to decide conformably to it." But if they be bloodthirsty judges, they may be influenced by their passions, and urge a conviction, and *transfer* him over to the gibbet to gratify public indignation or private malignity. If the judges be governed by proper motives,

and the jury should find a verdict of condemnation, all they can do is to set aside their verdict and confine the person till a new trial can be had ; and then all the ceremonies of another trial must be repeated before he can be acquitted ; but whenever a verdict of acquittal is found, a new trial cannot be granted.

[Here Mr. Martin referred to *Coke on Littleton*, and to the arguments which he had used on the impeachment of Judge Chase concerning the relative rights and duties of a court and jury.]

Before concluding, let me observe that it has been my intention to argue the cause correctly, without hurting the feelings of any person in the world. We are unfortunately situated. We labor against great prejudices against my client, which tend to prevent him from having a fair trial. I have with pain heard it said that such are the public prejudicies against Colonel Burr, that a jury, even should they be satisfied of his innocence, must have considerable firmness of mind to pronounce him *not guilty*. I have heard it not without horror. God of heaven ! have we already under our form of government (which we have so often been told is best calculated of all governments to secure all our rights) arrived at a period when a trial in a court of justice, where life is at stake, shall be but a solemn mockery, a mere idle form and ceremony to transfer innocence from the jail to the gibbet, to gratify popular indignation excited by bloodthirsty enemies ! But if it require in such a situation firmness in a jury, so does it equally require fortitude in judges to perform their duty. And here permit me again most solemnly and at the same time most respectfully to observe that in the case of life and death, where there remains one single doubt in the minds of the jury as to facts, or of the court as to law, it is their duty to decide in favor of life. If they do not, and the prisoner fall a victim, they are guilty of murder in *foro cœli*, whatever their guilt may be in *foro legis*.

When the sun mildly shines upon us, when the gentle zephyrs play around us, we can easily proceed forward in the straight path of our duty ; but when black clouds enshroud the sky with darkness, when the tempest rages, the winds howl, and the waves break over us, — when the

thunders awfully roar over our heads, and the lightnings of heaven blaze around us, — it is *then* that all the energies of the human soul are called into action. It is *then* that the truly brave man stands firm at his post. It is *then* that, by an unshaken performance of his duty, man approaches the nearest possible to the Divinity. Nor is there any object in the creation on which the Supreme Being can look down with more delight and approbation than on a human being in such a situation and thus acting. May that God who now looks down upon us, who has in his infinite wisdom called you into existence, and placed you in that seat to dispense justice to your fellow-citizens, to preserve and protect innocence against persecution — may that God so illuminate your understandings that you may *know* what is right; and may he nerve your souls with firmness and fortitude to *act* according to that knowledge.

Mr. Hay referred to several additional authorities, and especially *Kelyng*, 26, to prove that evidence showing that the accused was an accessory before the fact may be introduced to prove an indictment charging him to be the principal offender; that it was not therefore necessary to state that he was present at the commission of the fact; that the indictment did not state him to be present; that his absence, when the acts were performed by others by his command, was immaterial; that this position was supported by this case in *Kelyng*, and by two cases in *Hale* and *East*, which had been before referred to.

Mr. Martin stated that he considered the cases of Green and Messenger, reported in *Kelyng*, 70, and 2 *State Trials*, 591, as conclusive; that Green was found by the special verdict to be with the party, hallooing and throwing up his cap, and thereby encouraging them; but it was not found that he did any act of violence, or aided or assisted those who were present and did commit outrageous acts; that he was adjudged not to be guilty of treason; but those who were present, aiding and abetting the actors, were determined to be guilty. All the others who were not found to have acted themselves, or to have aided or assisted those who did, were determined not to be guilty. I consider this as a solemn adjudication, that to constitute a levying of war, there must be an act of violence committed.

Chief Justice. — Did the special verdict find that Green was associated with the party and apprised of their objects?

Mr. Martin. — It does not find that he aided or assisted the party, or did any act of violence, though he was one of the assembly, and threw up his cap.

Chief Justice. — That does not prove that it is necessary in all cases to strike a blow in order to constitute a levying of war. As it was not found that he was associated with them, or aided them, or committed any violence, he might have come thither by accident or curiosity. On such a special verdict the court could give no decision against the party accused. The court determined that there was not sufficient found to convict him; that he must be found to have done some act of violence, or to have been aiding and abetting the actors, before he could be convicted.

Mr. Martin still contended that the result must be the same; that some actual violence must be committed; that no person was answerable but those who did the violent acts, or aided or abetted the actors; and that a person who came to the place accidentally would not be charged. It would be known; and he would not be prosecuted.

Mr. Hay quoted 1 *Hale*, 623, to show that "though the accessory shall not be constrained to answer to his indictment till the principal be tried, yet if he will waive that benefit and put himself upon his trial before the principal be tried, he may; and his conviction or acquittal on such trial is good; but that it is necessary in such case to respite judgment till the principal be convicted and attaint; for if the principal be afterwards acquitted, that conviction of the accessory is annulled."

Mr. Wickham said that he would not controvert this authority, but insisted that it did not apply; that it had a contrary application in favor of the accused, because he had waived no right. He was indicted as a principal traitor, as the immediate perpetrator of the treason, and was compelled to answer such a general charge by the plea of Not Guilty; whereas, if he had been indicted as an accessory, he could not be tried without his own consent, and a formal waiver of the objection entered on the record.

Mr. Randolph then addressed the court to the following effect: —

The little fragment of time that is left for me, may it please your honors, I shall not abuse. The day before yesterday I informed the court that I had reserved to myself the right of fully answering the arguments of gentlemen on the other side; but I forbore to exercise it in consideration of my respect for Mr. Martin. But I said that if anything should be omitted by him, I would take the liberty of addressing the court to supply the omission. There is scarcely anything which Mr. Martin has not noticed. He has amused and instructed us; but it is difficult to come within that condition I had prescribed to myself; and there are two or three sentiments which I have much at heart, and on which I could not justify to myself to remain silent.

I do not mean to pass through the long series of authorities to which reference has been had; because not a single case has been adduced by the gentlemen for the prosecution that has not been fully answered, and its intended effects repelled. I shall endeavor to connect the observation I am about to make with the general subject already submitted to you; but though this cannot be done without mentioning principles which have been sufficiently discussed, I shall avoid repetition as much as possible, and endeavor to place the subject in such a clear point of view that our object cannot be misunderstood.

We have been charged with attempting to exclude further testimony, and thereby encroaching on the sacred rights of the jury. Courts have their rights; and juries have theirs. They are capable of being reconciled; for they are bodies of the same system. But although the court has no right to dictate the motion of the jury, it has a right to restrain them within their proper orbits. They are brethren in the administration of justice, not rivals in power; and if I were permitted to draw an analogy, I would say that the court is the father of the judicial family; that both are essential to administer justice according to law. This the court is bound to enforce; and this the jury are bound to obey.

Why should they complain? Because, say gentlemen,

we suppress testimony. How do we suppress testimony? They have a *carte blanche*, and are at liberty to suppose every other evidence, except what they know does not exist, i. e., the presence of Mr. Burr, and that actual force was employed. They may, if they can, prove everything short of these things. Have not gentlemen seized these with great eagerness? They have kept their eyes on the court, but alarmed the ears of the jury. They have professed to talk in the abstract, but have described with a pencil, whose strokes, dark as *Erebus*, and intended similitude and application, could not be mistaken. They have thrown, with rhetorical magic, into the caldron of public opinion already overboiling, poisonous ingredients, to the ruin of Colonel Burr. We wage an unequal war: an individual against the whole power and influence of the United States. We have to defend ourselves but with law and fact. Only permit us, if you please, to come with this dreadful disparity (for *thus* we have to contend), even when clothed with the mail of innocence. We ask for the benefit of the law. Why should we be upbraided for asking no more than the law has given us? That we must have. There is not a power on earth that can refuse us what the law gives. It is a privilege given, for good reasons, as a check to prevent the danger of perversion to oppression; of degeneracy to tyranny. We have *fundamental fact* to proceed upon: the absence of Colonel Burr from the scene of action. His absence is acknowledged; and if it were not, it is proved by us. Hence emerges a question, whether any facts, which *can* be proved, can convict him as a principal in the treason alleged to have been committed in his absence. If he were not present at Blannerhassett's Island, as stated in this indictment, how can he be convicted as a principal? After the admission that he was absent, how can they succeed? They cannot add one iota to what relates to this part of the business. It is a rule that cannot be controverted: that when an indispensable position cannot be proved, the court may interpose with respect to the law, and state its necessity to the jury. This is not a case of equivocal testimony, where credibility and mere weight are to be considered; which it would be improper for the court to decide upon. We ask your opinion of facts, concerning which there is

no doubt. Why should the trial proceed, if it should be the opinion of the court that proof of his *absence* cannot support the charge of his being *present* as an actor? Surely not to add fuel to the general inflammation which has already spread far and wide, and that only for the mere purpose of gratifying any one man or set of men; for this court sits not for the amusement of the public fancy, or the gratification of public malignity.

But, say they, may not the jury decide the law and the fact against the opinion of the court? But is it proper to produce a struggle between the court and jury? Ought the jury to disregard the opinion of the court when it is confessedly correct? When the court tells the jury truly that the *substratum* does not exist, a respectable jury never did and never will find a verdict of *guilty*.

They say that they are determined to probe this conspiracy, as it is called, to the bottom; and therefore they make these extraordinary efforts; but is there no respect that counsel ought to have for their character, to prevent them from pressing on the jury doctrines which they know to be illegal? Is there no respect due from the jury to the admonition of the court? If irrelevant testimony be to be admitted, twenty or twenty-five days or more may be spent in hearing what has no relation to the subject, and cannot affect us. It is in vain therefore to proceed. What ought we to expect from the court? Its authority. If the law is to be regarded, we have a right to call on the court for the exercise of its authority to prevent the introduction of illegal testimony.

If, indeed, as Mr. Hay and Mr. Wirt said, the consequences of this interposition of the court would be the annihilation of the rights of the jury, I would answer, that any individual on earth ought to be sacrificed rather than that so great a danger should be realized. I wish not to touch so inestimable an institution. But there exists no such danger. Why do we wish to have juries? It is that men of our own condition, and who have a fellow-feeling for us, should determine controversies and try accusations against individuals among us; so that no standing jurisdiction or permanent tribunal is to be employed to dictate the fate of any individual. It is a wise and humane regulation, that a jury should thus interpose

between the public and an individual. For it is very improbable that oppression will ever take place on that side. All is safe while decisions are on the side of tenderness. No precedent can be drawn from all this to sanction injustice or oppression.

It is objected that juries would thus be prostrated, and that the court might on the same principle decide against the accused. Who thus complains? Was it ever argued that the rights of the jury and the safety of the citizen were destroyed by a favorable opinion to the accused?

Let a Jeffreys arise, and succeed you on that seat, let him arrogate to himself what powers he pleases, let him encroach on privileges, and tyrannize over the rights of juries, and all those who shall advocate them, yet what examples would he take? If he would permit precedent to be quoted as authority before him, would he take the exercise of mercy for his example?

When this Jeffreys shall arise, he will not act on precedent, but will boldly bound over every barrier, if he wish to seize his victim; but if he were to follow precedent, he would never take one on the side of mercy. He would pursue an example of rigid severity and cruelty. Would Judge Chase have been impeached if, in the case of Callender, he had decided on the side of mercy? if he had yielded to the high-wrought pretensions of Callender? Would he have been impeached for a misdirection in issuing process had he directed a summons to issue, instead of a *capias*? Sir, it is a phenomenon in law and judicial proceedings that the accused should suffer now (as the counsel for the prosecution insist), in order to provide security for persons who may be accused hereafter! that his rights must be taken from him in order that others may not lose theirs!

Sir, I am not surprised that the people have been taught to believe that we mean to smother testimony. I have been told of it out of doors; and I have no doubt that such is the general opinion. This is the effect of the improper publicity given to whatever passes here. I have remonstrated against this malpractice, but in vain. We see that not a particle of intelligence is received, no step is taken, nothing happens here, which is not in twelve

hours made public. This intelligence will be diffused, augmented, and distorted. We make no attempts of this sort. These reports remain uncontradicted, and excite prejudices against us. I wish to know, then, how it can be shown that we have such an object in view. Where is the proof of smothering testimony? We deny the truth of the accusation. We wish not to suppress testimony; but it is our duty to oppose the admission of what is not lawful evidence, since so much prejudice has been excited against the accused.

Away, then, with this idea, that we wish to suppress testimony. We only claim what the law allows; and I am afraid that if he be deprived of this right there never will be again found in this country a tribunal able to fortify itself against popular clamor, or counsel sufficiently firm to support an unfortunate client against popular fury. I want no precedents. I want nothing but pre-eminence of virtue and talents to discern and decide. And while you are placed on the seat of justice, we fear not to meet that high tone of popularity, that popular rage which is so much, and, we say, so unjustly, inflamed against us; if not met now, it never can be met.

We are told that every man is a politician, and even judges may be so hereafter. Then we shall be in danger. When they become political partisans we shall be in danger. This evinces the greater necessity of adhering inflexibly to principle.

I do not wish to go beyond the seas for examples; but I cannot help reminding the court of the conduct of the illustrious Mansfield. He stood, on a critical occasion, as this court stood at the beginning of this trial. I am inclined to believe that the public prejudice has relented; but suppose it to be still in its full fury, the situations are similar. When the popular frenzy was at its utmost height, he had to encounter it. He displayed that unshaken firmness which this court now feels. He was unmoved by popular clamor, unawed by popular fury. He wanted no popularity but that which he was sure would follow him, and survive when he was no more; that which ever pursues meritorious conduct, the high meed of virtue, which is the best stimulus to the most honorable exertions.

If it were to be said that we want authority and precedent here for this firmness of conduct, we can say that our Washington is recorded in trials not wholly different. He was once in a situation where he might have been alarmed with what was called the popular voice. He was assailed by popular clamor and discontent; but he was firm to his purpose. I can only say that he would have been without an historian if he had not withstood them.

An argument has been already used, which, if well understood, cannot be resisted. I feel it to be firmly established; but I hope the court will excuse me for indulging myself in further explaining the principle; not because I deem it necessary after what has been said, but because I want the jury, this audience, and all the world to know and be impressed with what are the rights of the accused. It is this: that when a fact essential to the guilt of the accused does not exist, all further proceedings against him should cease. Examine this doctrine.

If a man were charged here with murder, and there were a certainty that there was no man killed; that the man said to be murdered was actually living, would the court permit the evidence to go on? Would it proceed when the fact of his being alive was proved and not controverted? Would you waste the time and money of the United States in the examination of further testimony when it was admitted that the indispensable fact of his death could not be proved?

Suppose a person on his trial for robbery: the person said to be put in fear and robbed comes and tells you that he was not put in fear. If the circumstance necessary to constitute the crime be acknowledged to be wanting, would you proceed with the trial?

So in the case of a trial for horse-stealing: the man whose horse is alleged to have been stolen comes and tells you that it was not *his* horse, but the horse of the party accused; would it not be idle to proceed further in such a trial?

So on a trial for any other larceny, for stealing any other property: if it were proved to belong to the prisoner, would not the trial be discontinued?

In like manner, if a person were on trial on a charge of forging a bill, and it were proved that the bill was not forged, but good and genuine, would the court permit any further proceedings in the cause? If a man were charged with the seduction of an infant, and it were proved that the supposed infant was of full age, would it not be a fruitless waste of time to proceed further? So, if a person were prosecuted for falsifying a record, and it were proved on the trial that there was no such record, would the court permit any further examination or proceeding in the trial to gratify the resentment or caprice of any man or set of men?

Would a court in any of those cases, or in any similar case, sit to hear and do nothing? What would you do in any such case? What would the jury do? What would the counsel do? The fact of *no crime* would be decisive in all those cases for the accused. Is not the principle the same here? As the fact of his *absence* is proved and admitted, it must be decisive in our favor. The *sine qua non*, his *presence, is indispensable to his conviction.* Where, then, is the use of further proceeding? I take the rule to be this: wherever a radical and essential fact is conceded or shown within the possibility of error, the court would pronounce it to be so, and interpose its authority to prevent further useless proceeding.

No testimony is admissible which is not relevant. How can that testimony be relevant when there is no subject to which it applies? How can there be relevant testimony in this case if presence be indispensable? I would as soon believe that there could be a shadow without a substance to produce it, as I would admit that we ought to go on to attempt a conviction when its foundation, *presence*, cannot be established.

All the authorities read on this subject are so fully elucidated that I feel myself justified in taking it for granted that they cannot proceed with the proof of collateral or accessorial matter without the main thing is proved; and we say that here it is not proved.

But then we are told that this cause ought not thus to be stopped, because he was not an accessory, but a principal. This subject has increased most wonderfully by the application of analogy. The gentleman who spoke

first (Mr. Mac Rae), compared this case to the case reported of a house with several rooms, in one of which a murder is perpetrated: enlarging the scene of action, he compared the United States to the house, and likened each state to a room in that house. The second gentleman who spoke on the subject (Mr. Wirt) enlarged the analogy from a house to a park, in a part of which a murder is committed. The doctrine of ratio is introduced: as one room in a house bears a proportion to another, so does one state in the Union to another in the federal building. As *this* room * is to the court-room, so are the bleak rocks of New Hampshire to the burning sands of Georgia.

Then he mentions another case: two men from Bedford come to kill a man in Richmond; and one remains in Manchester. And he says that the man in Manchester is to be considered a principal in the murder committed by him who came to Richmond. Well, sir, what bearing has this on the subject, even if he can be considered as a principal? For the criterion is, that he must be within *striking distance*, capable of affording immediate aid, in order to be a principal in the second degree. But I ask you, What would have been the consequence if one of them had remained in Bedford? Would that man be a principal? Could he be deemed to be constructively present? He could only be an accessory before the fact, and proceeded against in the manner already detailed.

A new theory is adopted to extend constructive presence as the theatre of action increases; as the difficulties of rendering aid are increased, they strengthen the *presumption* of aid. So that, as Colonel Burr had the whole western country to traverse, he should be considered as constructively present at the distance of one hundred and eighty miles from Blannerhassett's Island.

Sir, permit me to use analogy also. Will a cannon have a greater random, because its object is at a greater distance? Will a telescope reach in proportion to the distance of the star to which it is directed? Will the power of man increase in proportion to the distance of the scene of action? Will the power of man multiply

* They were then in the hall of the House of Delegates.

with addition of impossibilities? Can he do more than human nature is capable of? So, then, Mr. Burr had such genius and power that he was present at Blannerhassett's Island, though at the distance of one hundred and eighty miles from it! They seem to think him the soul of the world, and to have ubiquity. He must have been more than man to have accomplished what they charge him with. He must, as one of the witnesses (General Eaton) said, have ridden on the whirlwind and directed the storm — or descended on the sunbeams, as one of the counsel said. This converts the school of reason into the school of fancy. But this would have been the vain language of an inflated imagination, never compared with the power of man. It is the power of man that we speak of. It is not in the nature of man to do impossibilities. Is it common sense that the talents of a man, however great, should enable him to be multitudinous, because he is at a supposed distance? Suppose he had been at the head of the Mississippi, or in the neighborhood of the Pacific Ocean; would the scene of action have been so extended that he should be said to be on the spot, aiding and assisting at Blannerhassett's Island?

Where the rights of the citizen are so deeply involved, let us not abandon rational experience. Let not those rules which concern the rights of the citizen be mixed with doubtful doctrines. Let not the imagination be indulged. Let us tread in the same path in which our ancestors, with happiness to themselves, have trodden more than three hundred years, and we more than a hundred and fifty years; but do not let us wander into the fields of fancy. To venture on the extension of constructive crimes by analogy would be to make life and liberty mere footballs of imagination. Overwhelmed by such doctrines, the most innocent man amongst us might be destroyed.

Another circumstance has been offered to your consideration with a view of exciting the public indignation. Blannerhassett has been most piteously represented as a seduced person; and it is asked, What, shall the seducer be acquitted, and the seduced be the victim? And in order to make the representation more affecting, and to

excite our sympathy to a higher degree, the gentleman has gravely introduced his lovely wife and prattling children, his hatred of war, his love of music, of literature, and chemistry, till his seduction by the arts of Mr. Burr.

Sir, I believe that Blannerhassett is innocent. I know him to be innocent; and he may defy all the efforts to be made against him. But the situation in which he is placed does not reflect criminality on Colonel Burr. Do you examine into the character and conduct of the accessory in examining of the principal? as whether he were under the influence of the principal or not. Is not this an invitation to subvert all the rules of the law? Blannerhassett is not to be examined; but he is to be called small in guilt, because that of Mr. Burr is to be magnified. This is done not out of any cordiality to him, but in hatred of Burr. The question now, when he is tried as a principal, is, Is he guilty or not? Did he commit the fact? Whereas, according to law, when an accessory before the fact is examined or tried, the only question is, Did he abet or aid him who committed the act? and not whether he committed the act himself. This argument was not addressed to you, but to those who surround this great tribunal.

But the constitution, the law of England, and American decisions have been quoted to show that the prime mover is at any distance a principal. I will examine all these; but the constitution is what I have most at heart, and what I will first consider.

Mr. Hay says that he would rather the constitution should perish than the rights of juries. I revere both. I revere the constitution, because, among other blessings, it secures the rights of juries; and there is no man who hears me but is convinced that the rights incident to the trial by jury are secured by it.

The constitution is not express upon this subject; and if it be not express, are you to narrow it? Are you to conjecture so as to create a new crime, not only in name, but in substance, by introducing a new person which the constitution never contemplated by adding "*procuring*" as a crime to "*doing*"?

But we are told that the constitution has adopted terms

in treason which are well known. Be it so. But it is only to tell you what is the "*læsa majestas*" of the nation. It tells you that the legislature should never avail themselves of the malignant passions of the people so as to call that "*læsa majestas*" which is not so in fact.

The constitution only intended the classification of crimes which should be considered as tending directly to the subversion of the government. It was left to the legislature to say what particular acts should have this tendency, and to provide the punishment. The constitution supposed that there could be only two classes of cases in which the government could be subverted: levying war, and adhering to the enemies of the country. It never could have been intended to import aid from the common law to expound the constitution. It is only a general description; and the legislature are left to provide a proper remedy for the evil. The legislature, therefore, might have declared at any time what should be done with an accessory before the fact. They might punish this and other accessorial offences by a law coming within the sweeping clause which empowers Congress to make all laws which shall be necessary and proper to carry their enumerated powers into effect.

But the constitution is to be considered according to reason and moral right, and both ask if a transcendent offender be to slip down into an accessory? The answer is, that if reason which judges of the fitness of things, moral right which gives more latitude, or even common sense, be permitted to add persons according to different men's ideas of propriety, what advantage is derived from the principle which has been so long cherished, that penal laws shall be construed strictly? What becomes of the doctrine? What benefit can be had from the constitution containing precise terms and an express enumeration of powers, if moral right, common sense, and reason, according to the diversity of human opinions, are to be applied to infer and imply its meaning? We may apply these to *Eutopia*, *Oceana*, or even the visions of Plato, or rather the tribunal of Draco; for *wherever they*, or, what is the same thing, men's different conceptions of them, are to determine what shall be right construction, *there* will be a tribunal of blood. Language must indeed

be understood as the world understands it; but the ideas must not be extended beyond the natural import. I will ask a man of the most common understanding, who is not connected with the cause of Colonel Burr, whether a man at the distance of three hundred miles from the scene of operation can be the same as the actual perpetrator. Whether a man could be charged as present at the spot and doing an act when he was at three hundred miles' distance. What would be his answer? Would he not call it the grossest absurdity? Does not the very idea of law revolt at such a construction? The constitution does not impose it. The common law, the gentleman admits, does not impose it; but common sense requires it! So that common sense shall say *absence* is *presence*, and shall consider *one* man as *another*, and plunge a dagger into his breast against justice and reason! It is contrary to the common understanding of the world. It is impossible in the nature of things that a man at the distance of three hundred miles can be present. This transcends the wildest extravagance of fancy. By metaphysical legerdemain they annihilate space and consolidate identities!

The apprehensions which were entertained and the dangers predicted but a short time past from construction seem to have been soon forgotten. If you begin so early with creating offences by mere analogy, as *constructive* presence, where will you stop? Trace the consequences of taking one man for another. Reflect how many shades and approaches there are to guilt. If you can confound these without distinction, and charge a man who commanded an act to be done by his agent to have been present and to have done it himself — if you charge a crime directly contrary to facts, you mislead and surprise; you are arriving at a point which will involve doctrines of treason which were never intended by the framers of the constitution.

There is a passage in Hume's History which well applies to this subject. I do not say that it will be considered as an authority in a case of treason; but it merits our attention as suggesting useful reflections with respect to the progress of guilt and the promptitude with which the agents of those in power will oppress and destroy to

gratify their employers. The court will recollect the conduct of Henry II. towards Thomas à Becket, archbishop of Canterbury, whom he had raised from a low station to the highest offices, but whom he cordially hated and persecuted a long time on account of his signal ingratitude, his haughtiness, and rigid opposition to his power; which he considered to be treason.

After he had issued sentence of excommunication against some of the king's best friends, when the king was informed of it, being vehemently agitated, he burst into an exclamation against his servants, "whose want of zeal," he said, "had so long left him exposed to the enterprises of that ungrateful and imperious prelate." Four gentlemen of his household, taking these passionate expressions for a hint for Becket's death immediately communicated their thoughts to each other, and swearing to avenge their prince's quarrel, secretly withdrew. They took different routes, but, moving in concert and having an eye to the same end, arrived at the appointed place of meeting about the same time, and soon committed the horrid deed of assassination. Thus a supposed *hint* from the prince was sufficient for the murder of the prelate.

When the constitution was debated clause by clause in the convention, it was not insinuated by any of its opposers that the construction now contended for should ever be resorted to. The idea was never advanced that a man might be thus made a traitor by fiction and relation, and considered as constructively present and constructively an actor though at the distance of several hundred miles from the place of action, much less that such a construction would ever be countenanced in any of our courts of justice. Not even so much as a conjecture was hazarded to that effect. It never entered into my mind, nor do I believe it entered into that of any other member of that body. And if the common law, with this doctrine of constructive presence, had been a part of this constitution, all the talents on earth would never have been able to have carried it.

The people of Virginia thought themselves safe on this subject. The construction now advocated was not avowed, much less supported, in the state convention.

It is contended that this ought to be construed by the same rules as a common statutory crime. What is the reason why, when an offence is made felony by statute, it has all the consequences of a felony at common law? When the legislature declare a particular offence in positive terms to be a felony, then it must necessarily in the nature of things, like all other felonies, partake of their incidents, nature, and consequences; for it would not be a felony without having the qualities and conditions of a felony. But though this be the inevitable construction when a felony is created in general terms by a statute, yet if it be not so expressed, it is not to be interpreted so as to advance the remedy. There never was a question upon it as applied to statutes in capital cases. The books are uniformly against it; because penal laws must be strictly construed. The courts make an exception in favor of the accused, when there is the smallest departure from the letter of the statute. Is it not a principle that wherever a part fails to apply, the rest will be construed not to apply? If in England a particular crime be created a felony, that is the generical description of the offence; and by the principles of the common law, all the consequences of a felony at common law follow. So that the common law is applied to and ingrafted on the statute. But as the common law does not exist in the United States, it cannot be constructively applied to treason. It is true that common law terms are adopted in the constitution, and certain laws made under it; but they are not used in reference to the common law as a system, but in the common acceptation as mere terms of art; of which the true meaning may be found in any dictionary. And in relation to treason, the *words* used mean only a classification of the crime. They have no connection with the common law. How, then, is it to be interpreted? The gentleman asks what the members of the convention would have said of this case. I am not sure what the members of the convention would have said of this construction, nor that any individual there would have said what his opinion was; but this I will undertake to say, that there never was a more fruitful source of oppression than this interpretation. The members of the convention would have particularly provided

for such a case, if they had intended so uncommon a construction. They would have expressed it in the instrument itself, if they had contemplated a construction never heard of before; for you meet no instance of it in all the books. But there is no need of construction. The terms are plain. Constructive presence is neither expressed nor necessary to be implied. It was never thought of. But I will answer to the gentleman's question, what the members of the convention would have said, that, rather than that it was a "*casus omissus*," it was not intended to punish such offences. If it be asked why it was not mentioned, it may be answered, because it was not intended to be considered as guilt. But without adopting this exposition, it may be said that it was left to the future care of the legislature to enact laws on the subject and punish acts of accessorial agency. So that nothing should be referred to the imagination. When laws should take place, they would be understood in the plain and natural sense of the terms employed to express them.

Mr. Hay and Mr. Wirt have availed themselves of a learned description of the statute of the United States and the effect of its different clauses in order to show the responsibility as principal traitors of persons standing in the situation of the accused; and that it is impossible that it could ever have been intended that they should escape unpunished. The legislature may pass laws at any time to prevent their impunity; but if they were to escape by legislative failure or want of power, it would be better than that this court should transcend its authority and construe that to be treason which is not so within the true meaning of the constitution; which it would do if it were to consider Colonel Burr as present and an actor.

Both Mr. Hay and Mr. Wirt allege that he ought not to be considered as an accessory; that he is the prime mover and projector; and therefore he ought not to escape punishment. If he escape, is it not because the law declares that he ought to escape? Ought they to complain, if the law pronounce him to be innocent? Is the acquittal of the accused in a capital case matter of regret? Ought any man to be punished but according to law?

By what rule, then, shall this question be decided? By example? Washington himself was assailed many years before he died. Jefferson has been also assailed; and Robertson, whose character was above censure, was also assailed. His History was assailed; but he left it to mankind to judge for him; and posterity will do him justice. (See his letter to Gibbon.) And many other great and eminent characters have been in like manner assailed. So that neither virtue nor talents can secure from censure and obloquy.

By prudence? What would prudence accomplish? Criticism is severe and unjust everywhere; and many from mere motives of indolence are indisposed to inquire; some from party spirit, malignity in general, and particular enmity. Everything, even what had no affinity to the subject, would have been raked up, that could injure Colonel Burr.

By the effect? Assertion is nothing. Testimony complete and satisfactory is not to be collected. What would have been the effect of the affidavits published against him in the public prints, though taken *ex parte?* If believed for a moment, he ought not to have attended to them. The facility of denying that such a partial examination of witnesses ought to be considered an acquittal would have rendered his efforts unavailing.

By communicating his answer to their suspicions, to men in office? Nothing would have led them to listen to him but curiosity. Government ought not to be answered till it call. All the protestations of innocence on earth would have had no effect. They would have been as unavailing as in a case of murder; but on every proper occasion, Burr did communicate and answer every call.

By imparting to confidential friends? It will be shown that he has done this always. After he had done it, they assailed him worse. If arguments like these prevail, do not use a cobweb veil; but give an air of magnanimity to your conduct by avowing a resolve to condemn and save trouble. Choose to be a Robespierre or a jury of Stuarts. If he make such communications, he is violently assailed. If he be silent, he is charged with mysterious conduct. It is true that by the law of England, all persons concerned, principal and accessories, are equally punishable.

As Mr. Hay says, the crime covers the whole ground; what is not occupied by the one is held by the other. What then? Does he mean to say that because it is not so here, because the whole ground is not covered here, you must *stretch the law* sufficiently to cover it? Is this his plan for supplying omitted cases? Suppose an act merely preparatory, as writing a letter to advise, or deputing an agent to encourage, by a person who had never carried arms, nor been at Blannerhassett's, nor joined them at the mouth of Cumberland or any other place; could he be indicted as a principal who had carried arms and levied war? However unlawful such an act might be, it certainly could not amount to levying war. What the law would be on such occasion, I will not venture to say; but I ask, Where is the book that declares it to be an act of levying war? Compare that part, which you consider as authority, with that case, or that now before the court, and you will find that neither case would be treason of levying war. Though a person who forms a scheme and conducts it to maturity, and is at the head of his party, may be considered as a principal, yet he who only performs a mere preparatory act, as writing a letter, giving an advice relative to the acts at Blannerhassett's Island, cannot be deemed guilty of levying war. He cannot have levied war when he has done nothing more than to advise. To advise treason, when the treason is not actually begun, cannot be considered more than as an accessorial act. Is there not a plain difference between these two cases?

The man who instigates another to murder a man is considered only as an accessory; because not in a situation to afford immediate assistance to the person who perpetrates the act. If you apply this reasoning to Colonel Burr, as he was at a great distance, and could not give immediate aid to the actors, the same conclusion must result: that he could not be considered in any other light than that of an accessory before the fact. The gentleman says that Bonaparte was not present at the battle of Austerlitz. We know that he commanded the army; that he was on the ground; that he directed its movements and laid the plan of the battle, as much as if he had been in the heat of the action. He was *present* and

the *principal actor*. When you consider this case according to the English decisions, you can never believe that Mr. Burr can be considered as being at Blannerhassett's Island.

But we are told that he is not said to be at Blannerhassett's Island; that he is not alleged to have been there. The indictment charges him with having committed treason on Blannerhassett's Island with a great multitude of persons traitorously assembled and gathered together, armed and arrayed in a warlike manner; that he and those persons joined together at Blannerhassett's Island; and that he did with them, then and there, ordain, prepare, and levy war against the United States. Is not this a declaration that he was present? Could he have joined them there without being present with them? You must understand most clearly, from the terms of the indictment, that he was actually there. It admits of no other construction. But, sir, the American decisions have been quoted upon this point. It is said that the opinion of the Supreme Court in the case of Bollman and Swartwout was, that any person, "who performs any part, however minute and however remote from the scene of action, and who is leagued in the general conspiracy, shall be considered as a traitor." The import of these words, "perform any part, however *minute* or however *remote* from the scene of action," as meant by the Supreme Court, has certainly been misunderstood by gentlemen. Does the opinion of the Supreme Court mean by these words, "*minute* and *remote* part," that a party may be indicted as present who was absent? or that he who did not act, but merely advised, shall be indicted as having actually performed a part? The language of that court does not warrant the inference that the indictment may be so drawn as to mislead, instead of giving the accused notice of the proof to be exhibited against him, that he may prepare his defence. Does it mean that a person at the distance of five hundred miles shall be considered as present? Does it mean that they shall be punished according to the degree of their guilt? Does it mean to say that persons in the character of accessories shall be punished? Does it mean to say that there are no accessories in treason, and that all are principals? What, then, is the meaning of

the opinion? It must be this: by "*remote* from the scene of action" must be intended that any person, directly and indissolubly connected with the party perpetrating the act, though not at the spot, but near enough to give immediate aid at the time and place if necessary, is to be considered as engaged in the plot and guilty of treason. The judges viewed this subject without considering the question whether a man could be a principal notwithstanding his absence. Such an idea never occurred. The constitution ought to be construed according to the plain and obvious import of its words. It will be in danger if there should be a departure from this construction. It never can be supposed that its framers intended that this fancy and imagination should be indulged in its future exposition.

But, say gentlemen, whether he be an accessory or a principal, the indictment stands right. I deny it, sir. We have the soundest reasons to say that it cannot be supported in either case. Regarding him as a principal, the evidence cannot support it; and as it does not charge him as an accessory, no evidence of accessorial acts could prove it. The specification of the offence, according to the evidence to be brought to support it, has been always held necessary in England, and will never be deemed less useful by the people of this country. Are we to regard British forms and precedents? You have seen what they are. There have been several quotations from Hale and others on this point. But one quotation from 1 *Hale*, 238, would establish my position, were it properly understood, though it is relied on by them to show that an accessory before the fact may be indicted generally or specially. This authority shows that an accessory after the fact must be specially charged; that the indictment against the receiver of a traitor "must be *special* of the receipt." But they contend, that the accessory before the fact may be generally charged from these subsequent words, "and not generally that he did the thing, which may be *otherwise*, in case of one that is a procurer, counsellor, or consenter." He refers to Conier's case, as well as to Arden's case, in support of the principle, that receivers of traitors must be specially charged. But he refers to no authority as to an accessory before the fact

Authorities were read yesterday to show that indictments for *receiving* and *procuring* must stand on the same footing. Mr. Martin having so fully explained them, it will be sufficient for me to observe what may have escaped his notice. The words on which they found their argument are, "which *may be otherwise* in case of one that is a procurer," &c. Can this passage be absurd enough to mean that though a receiver shall be specially indicted, so as to be informed of the charge to be proved against him, yet a procurer, whose offence is more heinous, is not to be notified of the accusation against him, but may be surprised by a general charge? He does not show in what manner it is to be *otherwise;* nor that it *shall* be, but that it *may* be otherwise. That he intended to speak of indictments for compassing the death of the king is unquestionable. It has been already sufficiently shown that such indictments charge the compassing or imagining the death of the king in general terms; and that almost anything evincing an intention to kill him, or to subvert his government, is sufficient to support such a general accusation.

The case in *Kelyng*, before referred to, supports our construction; and *Hale*, in the place just quoted, adds that if the receiver were to be indicted in the same indictment with the principal offender, he ought to be "indicted specially of the receipt." And in vol. ii., p. 223, heretofore quoted, he sufficiently shows that the procurer ought also to be specially charged. Sir, is it not necessary to inquire what is the consequence of the conduct of Colonel Burr? If it be accessorial, the indictment must show the "*quomodo*." Why is any indictment in any case necessary? Why must indictments distinguish between principal actors in treason and those who are but accessorial agents? Because it informs them of the nature of the accusation, and enables them to defend themselves. The indictment against the adviser or procurer ought to notify him of the act of which he is considered the indirect perpetrator. You must show the manner in which he is liable.

Nor does this doctrine rest on English authority alone. It is not merely founded on the common law, as has been urged. It is supported by the principles of plead-

ing, which we have adopted. The forms of pleading show the sense of courts, as guides to reason. The eighth amendment of the constitution also requires it. It not only secures the enjoyment "of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed," but also that the accused "shall be informed of the nature and cause of the accusation, confronted with the witnesses against him," &c.

Consider this subject attentively. Reflect on the mode of prosecution which is advocated, and see whether it do not deprive us of this constitutional privilege. The language of any man, addressed to the accused on this subject, would be, "You are charged with treason; but you are to be informed of the nature and cause of the accusation, so as to enable you to prepare your defence." The indictment is shown him. It tells him that he actually levied war by raising men, and committing acts on a particular day, and at a particular place. Knowing his innocence of the charge, he pleads not guilty, and produces testimony to prove that he was not there; that during the whole time he was many hundred miles distant, or perhaps beyond sea. Against all this, when he comes to be tried, he is told, "It was not you that raised the army. We do not mean that you were there in person. You needed not to have summoned twenty or thirty witnesses to prove that you were not present. But you did what we insist is the same thing as levying war. You wrote a letter, in which you advised the thing to be done." He would very naturally answer, "If that be your meaning, I have been misled and deceived; I am not prepared for trial; and I pray that the cause may be continued." But he is told, "Your prayer cannot be granted. The jury are sworn, and you must take your trial."

Now, sir, should it be in the power of any government thus to mislead and destroy any man it may select for its victim? (I do not pretend to say that such is the disposition of this government; nay, I am sure that it is not.) But no child who could read the constitution could suppose that it could be ever so construed. Yet, sir, what babies we were if we expected the constitution to be thus correctly construed! If this construction be adopted, and

this species of indictment admitted, it will pervert this very palladium of our safety into an instrument of destruction. Mr. Hay knows that I intend nothing offensive to him. But when he tells me that his indictment fits this case, he deceives us. He deludes us into a trial in ignorance of the accusation, and drags us blindfold to the scaffold. This is the most intolerable hardship. Examine history from the beginning of the world to the end, you will find nothing like the character of an American legislature, who, professing to be the votaries of liberty, and to admire the principles of a free constitution, would permit such horrid oppression on their citizens: to keep them in the dark, to hold out the semblance of security to innocence, but to expose it to inevitable destruction! Sir, I could mention a thousand acts of oppression that would not be so severe as this. The party accused is intrapped and insnared. He is taken by surprise, and forced into a trial with the rope round his neck, without any means of preparation or defence. This is substance; not a phantom of the imagination. The forms of trial, the instruments of nominal justice, are to be wrought up into an engine of destruction. We call on you as guardians of this constitution, as far as depends on your acts, to preserve it from violation. I ask you to remember the difficulty of repairing the mischiefs of an oppressive construction, and permitting, unopposed, encroachments on the dearest privileges of the people. If this attempt be successful, where will persecution stop? If this be correct, fate has sealed it in your mind; and the law is only to force it. I feel myself so much roused by the idea of the effect that this doctrine would have, that did I not know that it came from a pure source, without any intention to injure or oppress, I would be alarmed. I would say, as Paul said to Agrippa, Believest thou in the constitution? I know thou dost. I ask you to save this rock of our salvation. For myself I do not care. I have not much to care, with respect to the remainder of my life. But for my children I feel the affection and solicitude natural to a parent; and for my country, those sentiments of patriotism which become every good citizen. Let not the great palladium of public liberty be underminded. I pray you that the rights of the citizen

may not be immolated at the shrine of faction and persecution; that innocence may not be ingulfed by the adoption of the doctrine of the prosecutors. American judges never can do this. I was going to use language too strong: American judges dare not do it.

But Mr. Hay asks, "Can an indictment be drawn any other way?" Mr. Martin has showed how easily it could be drawn otherwise; and Mr. Hay's own good sense would tell him that it ought to have stated that such persons levied the war, and that the accused procured it. It might have been done in a few words. Two lines would suffice. No; Mr. Hay wished to have the advantage of considering *absence* as *presence*, and the *procurer* as the *actor*. He says also that he has a right to go all over the county of Wood, and prove an overt act anywhere within it. I acknowledge that he had the right to lay the act in any part of the county of Wood. But when he says that it was committed at Blannerhassett's Island, he locates it — indissolubly locates it. It is the same as if the indictment had said, "Come and defend yourselves for what was done on Blannerhassett's Island;" and on trial he should tell him, "We take a scope of one hundred and fifty miles from it." He imposes on himself the necessity of proving every fact as he laid it. No other man imposed this upon him. He is therefore bound by his own voluntary statement.

But "he was constructively present;" and therefore the provision of the constitution, which says that the accused shall be informed of the nature and cause of his accusation, &c., cannot avail him, because it relates to the *offence* only, and not to the *person*. Why should Mr. Hay apply this part of the constitution, relating to the nature of the charge, to the description of the *offence* more than to that of the *person?* The nature of the offence is certainly to be *given to us*. We have a right to inquire and to know what it is. Is it treason, felony, or what is it? The generical description of the offence is comprehended in the charge. But it involves also the person; because you cannot give an account to the court of the offence without giving an account of the actors. Let Mr. Hay leave out the names of the actors, and see how it would be. It would be a nullity. He must par-

ticularly name the person accused, or there can be no accusation.

In my observations I was confined to general principles, which I examined without much attention to regularity or form; because I had nothing left me but the gleanings of those gentlemen who so elaborately and ably preceded me in the discussion. I particularly want the true exposition of the constitution, and the principles of law which apply to it, to be impressed on the minds of the jury; because such pains have been taken, especially by the second gentleman who spoke on the other side (and who so earnestly solicited the attention of the *outer bar*), to mislead them. I ask them to be watchful of our inestimable constitution; to guard it with unremitted attention. Let everything perish but the constitution; for it is the rock of our salvation.

As to the record of the conviction of the principal, it has been treated, by the gentlemen who prosecute, as mere flights before the fancy. But with whatever levity they may affect to treat it, I believe it will be a demurrer to their prosecution, which they cannot possibly overrule. But it seems we have waived the objection. How have we waived it? Did we intend to waive objections to a charge which was not made? Can we be reasonably supposed to have acquiesced in an accusation of which we were not apprised? There is no language in the indictment that can convey such an idea. It does not tell us that we were charged as an accessorial agent. Ignorance of facts misled us, and would excuse us before the whole world. Shall that ignorance arise from the prosecution, and then be quoted upon us to deprive us of our rights? Shall they take advantage of their own neglect? It is a principle universally correct, that no man shall take advantage of his own error. But according to this doctrine, you may hide from our eyes what we are to be prosecuted *for*, and what we ought to know; and then, because we made no objection to what you have concealed from us, you say that we have waived it; and thus punish us for your own wrong.

But it is said that the principal and accessory may be tried together; and it is asked, How, then, can the record of the conviction of the principal be required? This by

no means obviates the objection. You know that the same evidence is produced against both ; and the jury are sent out to examine with respect to the principal first ; and if they find him not guilty, they are to proceed no further. They are not to inquire into the acts of the accessory at all, but to acquit him of course. But if they find the principal guilty, then only are they to inquire with respect to the conduct of the accessory.

But they ask us, "Where is the hardship of being tried at this time?" They say that as fair a trial can be had now as at any time hereafter ; and if the jury find him guilty, the judgment may be respited till the principal shall be tried, and his guilt or innocence ascertained. But is a man to be hypothetically convicted? He is not indicted as an accessory, but as a principal. He is prosecuted for having done the act with his own hands ; but the evidence in the cause is, that he was at the distance of one hundred and fifty miles at the time, and that the act was done by others. Can a conviction be supported when there is such a variance? Yet he is to be held up to the world as hypothetically guilty, though on the trial of the principal the prosecution may be found to be groundless.

But it is said that our objections are derived from the common law ; and we are exultingly asked, "What can be the validity of objections founded on a system not in existence?" We have not urged a single principle but what will stand this test. All the principles we have advanced are either derived from the forms of pleading which we have adopted, or the laws of Virginia which have incorporated certain parts of the common law, or from particular acts of the legislature. This, I trust, is a complete and satisfactory answer to their question.

But it is said that we must take the benefit of this objection before the jury are sworn. This has been already answered. How could we take this benefit before we knew that it was necessary? If words are to have any force, what could we attend to but what was mentioned in the indictment?

Let me add a few words, with respect to the necessity of force, to what has been already said on that subject. According to what has been often observed in the course

of this trial, the crime consists of the beginning, the progress, and consummation; in the course of which, some force must be exhibited. A man might begin a crime and stop short, and be far from committing the act. He might go on one step still further without incurring guilt. It is only the completion of the crime that the law punishes. Suppose an army were embodied by Mr. Burr, and they only assembled and separated without having committed any act; what would the government have to complain of? When they punish a man for murdering another, it is because he is dead. When a man commits a robbery, it is because a person has been put in fear, and his property taken from him without his consent. So it is with respect to every other crime: while it is in an incipient state it is disregarded. No person is punishable who is only charged with such an inchoate, incomplete offence. The intention is never punished. In such cases time is allowed for repentance at any time before its consummation. Such an offence as this is never punishable, unless in the case of a conspiracy; and even on a prosecution charging that offence specially, the act of conspiring must be satisfactorily established. Here no injury has arisen to the commonwealth. No crime has been perpetrated. The answer to this is, that there were preparations to commit it. As far as communications have been made to the government, there is no possibility of proving a complete act; yet those accused must be punished. Then their rule of law is, that wherever there is a beginning of a crime, it shall be punished, lest it should grow to maturity! Is this the spirit of American legislation and American justice? Is it the spirit of its free constitution to consider the germ as the consummation of an offence? the intention, so difficult to be ascertained, and so easy to be misrepresented and misunderstood, as the act itself? In such a system it may be a source of lamentation, that no more than death can be inflicted on the completion of the crime. *Death, death* is to be the universal punishment, the watchword of humane legislation and jurisprudence!

When we mentioned the idea of force, I was not a little amazed at the manner in which they attempted to repel the argument. It was said that they were prepared to

show *potential* force ; that fear was used ; that an assemblage was *drawn* together to act on the fears of the people. This fear begins at New Orleans, mounts the Mississippi against the stream, and fixes itself at Blannerhassett's Island. Henry IV. fell a sacrifice to the predictions of the Jesuits. They determined to destroy him, and predicted that he would fall ; and he did fall. I may safely admit that fear really existed at New Orleans ; because the man who was interested to excite it, had it in his power most effectually to do so. A great conspiracy with vast numbers and means is feigned. A particular day is announced as the time of attack. The militia are brought together. They "surround the city ; spread the alarm in the coffee-houses and other public places ; guard the river, for they are coming in the next flood of the Mississippi." Thus terror and apprehension were excited by every stratagem imaginable. Are we to be sacrificed by base and insidious arts like these ? by the artifices of a man interested in our destruction to effect his own preservation ?

I have done, sir. I find myself hurt, that I could not give a greater scope to my feelings on this all-important subject. I will only add one remark ; which I hope will be excused, and considered as applying to all who occupy the sacred seat of justice. Judges have passed through the temple of virtue and arrived at that of honor ; but we find that it is a just decree from the free will of the people, that the floor of that temple is slippery. Some may suppose that because the wheel of fortune is not seen immediately to move, it is at rest. The rapidity deceives the sight. He who means to stand firm in that temple must place his hand on the statue of wisdom, the pedestal of which is a lion. These are the only qualities by which they can be useful in their honorable station. Popular effusion and the violence and clamor of party they will disregard. It is the more necessary, as judges may hereafter mingle in politics ; and they are but men ; and the people are divided into parties. In the conflicts of political animosity, justice is sometimes forgotten, or sacrificed to mistaken zeal and prejudice. We look up to the judiciary to guard us. One thing I am certain of, that you will not look at consequences ; that you will determine "*fiat justitia*," let the result be what it may.

MONDAY, AUGUST 31, 1807.

The *Chief Justice* delivered the following opinion: —

The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them.

A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States to prove the overt act laid in the indictment having shown, and the attorney for the United States having admitted, that the prisoner was not present when that act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance, and in a different state, it is objected to the testimony offered on the part of the United States, to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must therefore be rejected.

The arguments in support of this motion respect in part the merits of the case, as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made: —

1. That conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the court.

The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words "levying of war?" and who may be said to levy it? Had their first application to treason been made by our constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are perhaps of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would probably be a general admission that the term also comprehended making war or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war might be comprehended. The various acts, which would be considered as coming within the term, would be settled by a course of decisions; and it would be affirming boldly to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the mean-

ing of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood, in England and in this country, to have been used in the statute of 25 Edward III., from which it was borrowed.

It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers, who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection, he says, is a levying of war." In whom? — Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason; but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it.

Foster says, "The joining with rebels in an act of rebel-

lion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will *prima facie* make a man a traitor."

Foster does not say that he would be a traitor under the words of the statute independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England, this discrimination need not be made, except for the purpose of framing the indictment; and therefore in the English books we do not perceive any effort to make it. Thus surrendering a castle to rebels, being in confederacy with them, is said by Hale and Foster to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point Blackstone is not more satisfactory. Although we may find among the commentators upon treason enough to satisfy the inquiry, What is a state of internal war? yet no precise information can be acquired from them which would enable us to decide with clearness whether persons not in arms, but taking part in a rebellion, could be said to levy war, independently of that doctrine which attaches to the accessory the guilt of his principal.

If, in adjudged cases, this question have been taken up and directly decided, the court has not seen those cases. The argument which may be drawn from the form of the indictment, though strong, is not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued that, had this act amounted to levying war, she would have been indicted for levying war; and the furnishing of provisions would have been laid as the overt act. The court felt this when the precedent was produced. But the argument, though strong, is not conclusive; because, in England, the inquiry, whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was unimportant; and because, too, it does not appear from the indictment that she was actually concerned in the rebel-

lion — that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine that in treason all are principals to its source. Its origin is most probably stated correctly by Judge Tucker in a work the merit of which is with pleasure acknowledged. But if a spurious doctrine have been introduced into the common law, and have for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists, who seem to disapprove the principle, declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source for another reason: the terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war, or for assisting others in levying war, yet if in correct and legal language he can be said to have levied war, and if it have never been decided that the act would not amount to levying war, his case may without violent construction be brought within the letter and the plain meaning of the constitution.

In examining these words, the argument which may be drawn from felonies, as, for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation, composed of many parts, co-operating with each other. No one man, or body of men, can perform them all if the war be of any continuance. Although, then, in correct and in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit

treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war — who counsels and advises it — or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States, the constitution having declared that treason shall consist only in levying war, and having made the proof of *overt acts* necessary to conviction, is a question of vast importance, which it would be proper for the Supreme Court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine unless the case before them should require it.

It may now be proper to notice the opinion of the Supreme Court in the case of the United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued. This court is therefore required to depart from the principle there laid down.

It is true, that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

The court had employed some reasoning to show that without the actual embodying of men war could not be levied. It might have been inferred from this that those only who were so embodied could be guilty of treason.

Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extrajudicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the Supreme Court for reconsideration, in a case in which it would directly occur and be fully argued.

The court which gave this opinion was composed of four judges. At the time I thought them unanimous; but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who perhaps dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point, if possible, again before the Supreme Court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the Supreme Court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only

who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act; and they must be "leagued in the conspiracy." The person who comes within this description in the opinion of the court levies war. The present motion, however, does not rest upon this point; for, if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question, What is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case, it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms nor the application of force or violence are indispensably necessary to constitute the fact of levying war. To illustrate these positions, several cases have been stated; many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable. Its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself. There was no necessity to rely upon information drawn from extrinsic sources, or, in order to understand the fact, to pursue a course of intricate reasoning, and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because although the cases put may es-

tablish the doctrine they are intended to support — may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be supplied by other circumstances — yet, they also serve to show that the mind requires those circumstances to be satisfied that war is levied.

Their construction of the opinion of the Supreme Court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse, from any cause whatever, without firing a gun — I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has, or, it is believed, can be produced from those books in which it has been laid down that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government, the most active and influential leaders are generally most actively engaged in the war; and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give to the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's case is a case where there was no real application of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's case. This court is not inclined to controvert them.

But although, in this respect, the opinion of the Supreme Court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force or not in force, whether in a condition to use violence or not in that condition, is a levying of war. It is this construction, which has not indeed been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword ; and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words ; but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force ; and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

But the term, having been adopted by our constitution, must be understood in that sense in which it was univer-

sally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord *Coke* says that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason; for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs, in stating these cases, are such as indicate an impression on his mind that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion or insurrection is a levying of war within this act." "If any, with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force; nor can "a castle or fort be defended with strength and weapons invasive and defensive" without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke that to levy war there must be an assemblage of men in a condition and with an intention to employ force. He certainly puts no case of a different description.

Lord *Hale* says (149, 6), "What shall be said a levying of war is partly a question of fact; for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes a levying of war; for then every riot would be treason," &c.; "but it must be such an assembly as carries with it *speciem belli*, the appearance of war; as if they ride or march *vexillis explicatis*, with colors flying, or if they be formed into companies or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war; which circumstances are so various that it is hard to describe them all particularly."

"Only the general expressions in all the indictments of this nature that I have seen are *more guerrino arraiati*," arrayed in warlike manner.

He afterwards adds, "If there be a war levied as is above declared, viz.: an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum*, but not *percussum*."

It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. *Hawkins*, chap. xvii. sec. 23, says "that not only those who rebel against the king, and take up arms to dethrone him, but also, in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him; and therefore those that hold a fort or castle against the king's forces, or keep together armed numbers of men, against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king, and take up arms to dethrone him." In many other cases, those "who in a violent and forcible manner withstand his lawful authority." "Those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war; and it will be perceived that he puts no case in which actual force is dispensed with.

"Those also, he says, who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt *with force* to redress it, are said to levy war against the

king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative by attempting to do that by private authority which he by public justice ought to do ; which manifestly tends to a downright rebellion. As where great numbers *by force* attempt to remove certain persons from the king, &c." The cases here put by Hawkins, of a constructive levying of war, do in terms require force as a constituent part of the description of the offence.

Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colors, &c., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Damaree and Purchase, he says, "The want of those circumstances weighed nothing with the court, although the prisoner's counsel insisted much on that matter." But he adds, "The number of the insurgents supplied the want of military weapons ; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a warlike posture ;" that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase from 8 *State Trials ;* and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states, sec. 4, all insurrections to effect certain innovations of a public and general concern, *by an armed force,* to be, in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying of war all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying war ; that is, where the war is intended directly against the government.

He says, sec. 9, "An assembly armed and arrayed in a warlike manner, for a treasonable purpose, is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner, for any treasonable purpose," is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force; though that state is not expressed in terms; for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened; they are "without coming to a battle or action." "If men be enlisted and march" (that is, if they march prepared for battle or in a condition for action; for marching is a technical term applied to the movement of a military corps), it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the *State Trials*, from which the extracts are taken. The words used by the chief justice are, "When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "Intending to levy war is not treason, unless a war be actually levied." To this the chief justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set

out and cruise, and come with a design to destroy our ships?" Mr. Phipps still insisted "it would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the chief justice, "the going on board and being in a posture to attack the king's ships." Mr. Baron Powis added, "But for you to say that because they did not actually fight, it is not a levying of war. Is it not plain what they did intend? that they came with that intention? that they came in that posture? that they came armed, and had guns and blunderbusses, and surrounded the ship twice? They came with an armed force; that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority upon a march or in quarters is levying war." "Holding a castle or fort against the king or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer, as supposed by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason."

The whole doctrine of Judge Foster on this subject seems to demonstrate a clear opinion that a state of force and violence, a posture of war, must exist to constitute technically, as well as really, the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws, or to remove evil counsellors or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere *forcibly* in matters of such high importance."

He proceeds to give examples of levying war, which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war" have not received a technical different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practise hostility.

Several judges of the United States have given opinions at their circuits on this subject; all of which deserve and will receive the particular attention of this court.

In his charge to the grand jury when John Fries was indicted, in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether, any *forcible opposition*, calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Patterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not, indeed, precisely state the employment of force as necessary to constitute a levying war; but in giving his opinion, in cases in which force was actually employed, he considers the crime in one case as dependent on the intention; and in the other case he says, "Combining these facts and this design" (that is, combining actual force with a treasonable design), "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration, he says, "The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the

treason of levying war; and the quantum of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons is wholly immaterial.

"The court are of opinion that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case of Fries, the same sentiments are to be found. It is to be observed that these judges are not content that troops should be assembled in a condition to employ force. According to them, some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war, than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given, the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said all these authorities have been overruled by the decision of the Supreme Court in the case of the United States against Swartwout and Bollman.

If the Supreme Court have indeed extended the doctrine of treason further than it has heretofore been carried by the judges of England or of this country, their decision would be submitted to. At least, this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before rec-

ognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the Supreme Court. The foundation on which this argument rests is the omission of the court to state that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn; which passages are mingled with others, which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated. It was therefore sufficient for the court to say that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assemblage which would amount to levying of war; but as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. After these preliminary observations, the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent, which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context; and nothing like dispensing with force appears in this paragraph. The expressions are, "To constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country;" speaking in general terms of an assemblage of men for this, or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph the court says, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied,—that is, if a body of men be actually assembled in order to effect by force a treasonable purpose,—all those who perform any part, however minute, &c., and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose. An assemblage to constitute an ac-

tual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained, explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences: "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem intended to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that, in the mind of the court, the assemblage stated in that paragraph was an assemblage in arms; that the individuals who composed it had appeared in arms against their country; that is, in other words, that the assemblage was a military, a warlike assemblage.

The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court; and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said, "A design to overturn the government of the United States in New Orleans *by force* would have been unquestionably a design which, if carried into execution, would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States."

Now, what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage. The decisions theretofore made by the judges of the United States are then declared to be in conformity with the principles laid down by the Supreme Court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Patterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the

purpose to which the force was to be applied, than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force.

After stating the verbal communication said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to, or a mean of, executing some greater projects, the design was unquestionably treasonable; and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators, who might be found together after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expression "any assemblage of men" is restricted by the words "for this purpose." Now, could it be in the contemplation of the court that a body of men would assemble for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe, "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage," "for the purpose of overturning the government of New Orleans by force" to be only equivalent to a secret furtive assemblage without the appearance of force?

After quoting the words of Mr. Swartwout, from the affidavit in which it was stated that Mr. Burr was levying an army of seven thousand men, and observing that the

treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court says, "The question then is, whether this evidence prove Colonel Burr to have advanced so far in levying an army as actually to have assembled them."

Actually to assemble an army of seven thousand men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitute the fact of levying war, the court proceeds to say, "It is argued that since it cannot be necessary that the whole seven thousand men should be assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime."

This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined; but it is necessary there should be an actual assemblage; and therefore this evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men and their marching from places of partial to a place of general rendezvous would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous (that is of the army) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The travelling of individuals to the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? "Because,"

says the court, "this would be an equivocal act, and has no warlike appearance." The act, then, should be unequivocal, and should have a warlike appearance. It must exhibit, in the words of Sir Matthew Hale, *speciem belli* — the appearance of war. This construction is rendered in some measure necessary when we observe that the court is qualifying the position, "that the army commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position, they say, "The travelling of individuals would, perhaps, not be sufficient." Now, a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together; and the words, being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might in correct language be denominated "marching by detachments."

The court then proceeded to say, "The meeting of particular bodies of men and their marching from places of partial to a place of general rendezvous would be such an assemblage."

It is obvious from the context that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done, an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a place of general rendezvous. In describing the mode of coming to this assemblage the civil term "travelling" is dropped, and the military term "marching" is employed. If this were intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a place of general rendezvous, composed of bodies of men who had previously assembled at places of partial

rendezvous. But this is not intended as a definition; for clearly if there should be no places of partial rendezvous, if troops should embody in the first instance in great force for the purpose of subverting the government by violence, the act would be unequivocal; it would have a warlike appearance; and it would, according to the opinion of the Supreme Court properly construed, and according to English authorities, amount to levying war. But this, though not a definition, is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should *march* from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before it in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly it ought not to be so understood when it says in express terms that "it is more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the Supreme Court, it will be observed that the direct question, whether an assemblage of men, which might be construed to amount to a levying of war, must appear in force or in military form, was not in argument, or in fact before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn without particularly adverting to this question; and therefore upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investi-

gation of this opinion, although the terms, force and violence, are not employed as descriptive of the assemblage, such requisites are declared to be indispensable as can scarcely exist without the appearance of war and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion, decisions are quoted and approved, which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the Supreme Court considered a secret unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, it expresses itself so as to show that this idea was never discarded; and it uses terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing if opposed to that of the Supreme Court; but if he were one of the judges who assisted in framing that opinion, if, while the impression under which it was framed was yet fresh upon his mind, he delivered an opinion on the same testimony not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

To the judge, before whom the charge against the prisoner at the bar was first brought, the same testimony was offered with that which had been exhibited before the Supreme Court; and he was required to give an opinion in almost the same case. Upon this occasion he said, "War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war." Again he observed, "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction; and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions; and it is to be recollected that he had just returned from the Supreme Court, and was speaking on the very facts on which the opinion of that court was delivered.

The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the United States, violently to dismember the Union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war; and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war provided the force assembled be sufficient to attain, or perhaps to justify, attempting the object without them." This paragraph is immediately followed by a reference to the opinion of the Supreme Court.

It requires no commentary upon these words to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force; and that he so understood the opinion of the Supreme Court. If in that opinion there may be found in some passages a want of precision, and an indefiniteness of expression, which have occasioned it to be differently understood by different persons, that may well be accounted for, when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance: the court, unquestionably, did not consider arms as an indispensable requisite to levying war. An assem-

blage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object as, at all times, an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, — it is thought too hastily, — that the nature of the assemblage was unimportant; and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large and to review the opinion of the Supreme Court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war were committed on Blannerhassett's Island, to the jury under this explanation of the law, and to instruct them that unless the assemblage on Blannerhassett's Island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the Supreme Court entirely on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, Why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat and sailing down the Ohio for the avowed purpose of attacking New Orleans could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not

the Supreme Court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force?

The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men, convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention; at any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended; but it serves to show that general phrases must always be understood in reference to the subject matter and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made:—

1st. That this indictment, having charged the prisoner with levying war on Blannerhassett's Island, and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2dly. That admitting such an indictment could be supported by such evidence, the previous conviction of some person, who committed the act which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act.

As to the first point, the indictment contains two counts; one of which charges that the prisoner, with a number of persons unknown, levied war on Blannerhassett's Island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their

proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blannerhassett's Island, nor in the county of Wood, nor in the district of Virginia.

In considering this point, the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence. That at common law an indictment would have been defective, which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to *Hawkins*, b. 2, ch. 25, sect. 84, and ch. 23, sect. 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of Congress which requires that twelve petty jurors at least shall be summoned from the county where the offence was committed.

A description of the particular manner in which the war was levied seems also essential to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. *Foster*, p. 149, speaking of the treason of compassing the king's death, says "From what has been said it followeth that in every indictment for this species of treason, and indeed for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence."

In page 220, *Foster* repeats this declaration. It is also

laid down in *Hawk.* b. 8, ch. 17, sect. 29, 1 *Hale*, 121, 1 *East*, 116, and by the other authorities cited, especially Vaughan's case. In corroboration of this opinion, it may be observed that treason can only be established by the proof of overt acts; and that by the common law as well as by the statute of 7th of William III., those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defence.

It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

All the authorities which require an overt act, require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief, instead of an advantage, to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.

But it is contended on the part of the prosecution, that although the accused had never been with the party which assembled at Blannerhassett's Island, and was, at the time, at a great distance, and in a different state, he was yet legally present, and therefore may properly be charged in the indictment as being present in fact.

It is therefore necessary to inquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and

yet be legally, as well as actually, absent while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the Union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire — if this chief should be there captured, and sent to the other extremity for the purpose of trial — if his indictment, instead of alleging an overt act, which was true in point of fact, should allege that he had assembled some small party, which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia at a time when in reality he was fighting a battle in New Hampshire — if such evidence would support such an indictment by the fiction that he was legally present, though really absent, all would ask, To what purpose are those provisions in the constitution which direct the place of trial and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally absent, who has counselled or procured a treasonable act, is proved by all those books which treat upon the subject; and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment, speaking upon general principles, would charge him according to the truth of the case. Lord Coke says, "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. "For in treason," continues Lord Coke, "all be principals; and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if by our constitution the doctrine that an accessory becomes a principal be not adopted, in

consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books that whatever will make a man an accessory in felony will make him a principal in treason; but it is nowhere suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster has been particularly quoted; and certainly he is precisely in point. "It is well known," says Foster, "that in the language of the law there are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason." The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessory at common law will render him a principal in treason. In other passages, the words "command," or "procure," are used to indicate the same state of things, that is, a treasonable assemblage produced by a man who is not himself in that assemblage.

In point of law, then, the man who incites, aids, or procures a treasonable act, is not, merely in consequence of that incitement, aid, or procurement, legally present when that act is committed.

If it do not result, from the nature of the crime, that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances; and to judge how far the circumstances of any case can make him legally present, who is in fact absent, the doctrine of constructive presence must be examined.

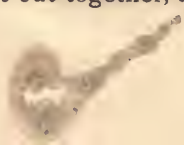
Hale, in vol. i. p. 615, says, "Regularly no man can be a principal in felony unless he be present." In the same page he says, "An accessory *before* is he that, being

absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact."

These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds (p. 349), "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases, from which Foster drew this general principle, will serve to illustrate it. *Hale*, 439. In all these cases, put by Hale, the whole party set out together to commit the very fact charged in the indictment; or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. *Hale*, in p. 449, giving the reason for the decision in the case of the Lord Dacre, says, "They all came with an intent to steal the deer; and consequently the law supposes that they came all with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way.

In both these cases, stated in *Hale*, 534, the persons actually set out together, and were near enough to assist



in the commission of the fact. That in the case of Pudsey, the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration ; so far as respected distance, as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. *Foster*, 350, plainly supposes the same particular design, not a general design composed of many particular distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case which is, perhaps, common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual ; and each performs the part assigned to him. Some ride up to the individual and demand his purse. Others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals ; and all, in construction of law, are present. But suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals or different companies ; to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do indeed belong to the general party ; but they are not of the particular party which committed this fact. Foster concludes this subject by observing that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary ;" that is, at the particular fact which is charged. He must be ready to render assistance to those who are committing that particular fact. He must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books go to the

same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blannerhassett's Island; and the whole question to which the inquiry of the court is now directed is whether the prisoner was legally present at that fact.

I say this is the whole question; because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed.

If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. It is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defence with considering the overt act as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle: that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division of that point,—if the expression be allowed,—which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases.

Had the prisoner set out with the party from Beaver for Blannerhassett's Island, or, perhaps, had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact. Had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before they reached the island — if he did not join them there, or intend to join them there — if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state — if the overt acts of treason to be performed by him were to be distinct overt acts — then he was not of the particular party assembled at Blannerhassett's Island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blannerhassett's Island, but the whole evidence shows he was not of that party.

In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessory, and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

The reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place when actually at another; or as aiding in one transaction while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring that he who counsels, procures, or aids treason, is guilty accessorially, and solely in virtue of the common law principle, that what will make a man an accessory in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person levying war in Kentucky may be said to be constructively present

and assembled with a party carrying on war in Virginia, at a great distance from him, then he is present at every overt act performed anywhere. He may be tried in any state on the continent where any overt act has been committed. He may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is, perhaps, too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Patterson in Mitchell's case has been cited on this point. 2 *Dall.* 348.

The indictment is not specially stated; but from the case as reported, it must have been either general for levying war in the county of Alleghany, and the overt act must have been the assemblage of men and levying of war in that county; or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result is the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's Field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburg; that there was also an assemblage at a different time at Couch's Fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couch's Fort, the resolution was taken to attack the house of the inspector; and the body there assembled marched to that house and attacked it. It was proved, by the competent number of witnesses, that he was at Couch's Fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action attending the body of one of his comrades who was killed in it. One witness swore positively that he was present at the burning of the house; and a second witness said that "it run in his head that he had seen him there." That a doubt should exist in such a case as this, is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case? Couch's Fort and Neville's house being in the same county, the assemblage having been at Couch's Fort, and the resolution to attack the house having been there taken, the body having for the avowed purpose moved in execution of that resolution towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couch's and the marching from thence; and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meeting at Couch's, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it; and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couch's, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed, by any person who observes the caution with which Judge Patterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jeffreys is enrolled.

But to estimate the opinion in Mitchell's case, let its circumstances be transferred to Burr's case. Suppose the body of men assembled in Blannerhassett's Island had previously met at some other place in the same county; that Burr had been proved to be with them by four witnesses; that the resolution to march to Blannerhassett's Island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that

another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood County generally — the cases would then have been precisely parallel; and the decision would have been the same.

In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blannerhassett's Island; and the court is strongly inclined to the opinion that without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that although he was absent, yet if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be, that the indictment would be defective unless it alleged the presence of the person indicted at the act of treason. If, upon a special verdict, facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded he would not; and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blannerhassett's Island, it ought to be so construed now. But this is unimportant; for if the indictment alleges that the prisoner procured

the assemblage, that procurement becomes part of the overt act, and must be proved, as will be shown hereafter.

The second position is founded on 1 *Hale*, 214, 288, and 1 *East*, 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments (since it admits that one case may be stated, and a very different case may be proved), I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and therefore ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that had the public received his corrected instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied universally to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence; that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or

conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals."

This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other treasons. Had he designed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms to cases which he has expressly treated in which he has not himself applied it, and on which he as well as others has delivered opinions which that dictum would overrule. This would be the less justifiable if there should be a clear legal distinction indicated by the very terms in which the judge has expressed himself between the particular case to which alone he has applied the dictum and other cases to which the court is required to extend it.

There is this clear legal distinction: "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins and that class of treasons among which levying war is placed, is taken in the statute of Edward III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case in which a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow that in other cases where a general indictment would not be

sufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled to himself, and with the general principles of the law, only by permitting the limits which he has himself given to his own dictum to remain where he has placed them.

In page 238, *Hale* is speaking generally to the receiver of a traitor, and is stating in what such a receiver partakes of an accessory: 1st. "His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counsellor, or consenter."

The words "may be otherwise" do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment must be special on the receipt, and not general. The words "may be otherwise in case of a procurer," &c., signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that Hale used these words in their restricted sense; that he used them in reference to treasons in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point, *Kelyng*, 26, and 1 *Hale*, 626, have also been relied upon. It is stated in both, that if a man be indicted as a principal and acquitted, he cannot afterwards be indicted as an accessory before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it

would be overruled. Were such a case produced, its application would be questionable. Kelyng says an accessory before the fact is *quodam modo*, in some manner guilty of the fact. The law may not require that the manner should be stated; for in felony it does not require that an overt act should be laid. The indictment therefore may be general; but an overt act of levying war must be laid. These cases, then, prove in their utmost extent no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay specially, bear some analogy to a general and a special action on the case. In a general action the declaration may lay the assumpsit according to the legal effect of the transaction; but in a special action on the case, the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in *Hale*, 625, immediately preceding that which has been cited at the bar. He says, "If A be indicted as principal, and B as accessory *before* or *after*, and both be acquitted, yet B may be indicted as principal, and the former acquittal as accessory is no bar."

The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessory, while an acquittal as accessory may not be pleaded in bar to an indictment as principal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessory, the question recurs, On what legal ground does this distinction stand? I can imagine only this: an accessory being *quodam modo* a principal in indictments where the law does not require the manner to be stated which need not be special, evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as accessory may be special. The very allegation that he is an accessory must be a special allegation, and must show how he became an accessory. The charges of this special indictment therefore must be proved as laid, and no evi-

dence which proves the crime in a form substantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not consist in the assemblage; for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved: it constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? must it not also be proved? must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual make the guilt of the assemblage his guilt, and in the other case the procurement by the individual make the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if it were guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act,

then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present by a train of conjectures, of inferences, or of reasoning; the fact must be proved by two witnesses. Neither, where procurement supplies the want of presence, is the mind to be conducted to the conclusion that the accused procured the assembly by a train of conjectures, of inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district.

If it be said that the advising or procurement of treason is a secret transaction, which can scarcely ever be proved in the manner required by this opinion, the answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct inference from this circumstance would seem to be, that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If, then, the doctrines of Kelyng, Hale, and East be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blannerhassett's Island must be proved, not circumstantially, but positively, by two witnesses to charge him with that assemblage. But there are still other most important considerations which must be well weighed before this doctrine can be applied to the United States.

The eighth amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be said to be "informed of the nature and cause of the accusation," unless the indictment give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defence.

It is also well worthy of consideration that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessory before the fact into the principal, and to make the act of the principal his act. The accessory before the fact is not said to have levied war. He is not said to be guilty under the statute, but the common law attaches to him the guilt of that fact which he has advised or procured; and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform: it is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decision that these accessorial crimes are not in the case of treason excluded by the definition of treason given in the constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case which absolutely required it, unless I could confer respecting it with the judges of the Supreme Court.

I have said that this doctrine cannot apply to the United States without implying those decisions respecting the common law which I have stated; because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer be within the definition of levying war, and independent of the agency of the common law do actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act on which he is to be convicted, then it must be charged in the indictment; for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that although it should be conceded that since

the statute of William and Mary, he who advises or procures a treason may, in England, be charged as having committed that treason by virtue of the common law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offence, and permit them to be charged as one, yet it can never be conceded that he who commits one overt act under the statute of Edward can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper in this place again to advert to the opinion of the Supreme Court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, — that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, — all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According to the opinion it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part: that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action; that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted.

The opinion does not declare that the person who has performed this remote and minute part may be indicted

for a part which was in truth performed by others, and convicted on their overt acts. It amounts to this, and nothing more: that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. It may possibly be the opinion of the Supreme Court that those who procure a treason, and do nothing further, are guilty under the constitution. I only say that opinion has not yet been given; still less has it been indicated that he who advises shall be indicted as having performed the fact.

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blannerhassett's Island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place: indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country, unless by virtue of a similar operation; a point far from being established, but on which for the present no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner and by the same kind of testimony which would be required to prove actual presence.

The second point in this division of the subject is, the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point presupposes the treason of the accused, if any have been committed, to be accessorial in its nature.

Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence, is a point already discussed and decided. It is, then, apparent that but for the exception to the general principle which is made in cases of treason, those who assembled at Blannerhassett's Island, if that assemblage were such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although in truth the chief traitors, would in law be accessories.

It is a settled principle in the law that the accessory cannot be guilty of a greater offence than his principal. The maxim is, *Accessorius sequitur naturam sui principalis* — the accessory follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried; for the degree of guilt which is incurred by counselling or commanding the commission of a crime, depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A shall be established in a prosecution against B. Consequently, if the guilt of B depends on the guilt of A, A must be convicted before B can be tried. It would exhibit a monstrous deformity indeed in our system if B might be executed for being accessory to a murder committed by A, and A should afterwards upon a full trial be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could in no case be tried before the conviction of his principal, nor can he yet be tried previous to such conviction unless he require it, or unless a special provision to that effect be made by statute.

If, then, this were a felony, the prisoner at the bar

could not be tried until the crime were established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal and the other the accessory; for that would be ground on which a great law principle could never stand. Not because there was in fact a difference in the degree of moral guilt; for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe is, perhaps, of the two the blacker criminal; and were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blannerhassett's Island depends not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs; and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessory, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others; and which, if it be a criminal act, renders them guilty also. His guilt therefore depends on theirs; and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial,

seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

If from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted.

These authorities have been read and commented on at such length that it cannot be necessary for the court to bring them again into view. It is the less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, contended that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had by implication waived his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted; and that he ought not to be considered as waiving the right to demand the record of conviction, unless with the full knowledge of that right he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it; because pleading to an indictment, in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed had he been charged with having advised the act. No person indicted as a principal can be expected to say, I am not a principal. I am an accessory. I did not commit, I only advised, the act.

The authority of the English cases on this subject de-

pends in a great measure on the adoption of the common-law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact; and the question, whether the treasonableness of the act may be decided in the first instance in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessory, rather than on the positive authority of those decisions.

This question is not essential in the present case; because if the crime be within the constitutional definition, it is an overt act of levying war, and, to produce a conviction, ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to sit and hear testimony which cannot affect the prisoner? or ought the court to arrest that testimony? On this question much has been said; much that may, perhaps, be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony; and, in the course of the argument, it has been repeatedly stated, by those who oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct, is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that, in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal; for they do not agree. The jury cannot constitute it; for the question is, whether

they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of Congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common-law principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions at a different place and in a different state, in order to prove — what? the overt act laid in the indictment? that the prisoner was one of those who assembled at Blannerhassett's Island? No; that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses; not by the establishment of other facts, from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. The conclusion, that in this state of things no testimony can be admissible, is so inevitable that the counsel for the United States could not resist it. I do not understand them to deny that, if the overt act be not proved by two witnesses so as to be submitted to the jury, all other testimony must be irrelevant; because no other testimony can prove the act. Now, an assemblage on Blannerhassett's Island is proved by the requisite number of witnesses; and the court might submit it to the jury whether that assemblage amounted

to a levying of war; but the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness; and of consequence all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this: it is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished? or can it be deemed necessary? If enough be proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness?

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact; of which the jury, aided by the court, must judge. To that declaration the court still adheres.

It was said that if the overt act were not proved by two witnesses, no testimony in its nature, corroborative or confirmatory, was admissible, or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general commanding an army should detach troops for a distant service, would the men composing that detachment be traitors? and would the commander-in-chief escape punishment?

Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war. Detaching a military corps from it for military purposes might also be an overt act of levying war. It is not pretended that he would not be punishable for these acts. It is only said that he may be tried and convicted on his own acts in the state where those acts were committed, not on the acts of others in the state where those others acted.

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction, as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere and subsequent to the transaction on Blannerhassett's Island can be admitted; because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in

itself, is irrelevant until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blannerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinion for reasons which have been already assigned, and as it is understood from the statements made on the part of the prosecution that no such testimony exists. If there be such, let it be offered, and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

TUESDAY, SEPTEMBER 1, 1807.

Mr. Hay informed the court, that he had nothing to offer to the jury of evidence or argument; that he had examined the opinion of the court, and must leave the case with the jury.

The jury accordingly retired, and in a short time returned with the following verdict, which was read by Colonel Carrington, their foreman: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."

This verdict was objected to by Mr. Burr and his counsel as unusual, informal, and irregular. Mr. Burr observed, that wherever a verdict is informal the court will either send back the jury to alter it, or correct it itself; that they had no right to depart from the usual form; that the rule universally is to ask them on their return, "How say you? is he guilty or not guilty?" to which they give a direct answer of "guilty" or "not guilty;" that this is correct and responsive to the charge always read to them by the clerk: "If you find him guilty, you are to say so, &c.; if you find him not guilty, you are to say so, and no more."

Mr. Hay thought the verdict ought to be recorded as found by the jury, which was substantially a verdict of acquittal; and that no principle of humanity, policy, or law forbade its being received in the very terms used by

the jury; that they were not bound to find a verdict in the shortest possible way; that the form did not affect the substance.

Mr. Martin said that it was like the *whole play*, "Much ado about Nothing;" that this was a verdict of acquittal; that there was nothing to do but to answer the question of guilty or not guilty; that it was the case with every jury in every instance, they had or had not evidence before them. Did they wish to have the verdict entered in this form on the record, as a censure on the court for suppressing irrelevant testimony? that he was conscious they had no such meaning; and as they had not, the jury ought to answer the question judicially addressed to them simply by a verdict of not guilty, as that was their intention.

Colonel Carrington, one of the jury, observed that it was said among themselves, that if the verdict was informal they would alter it; that it was in fact a verdict of acquittal.

The chief justice said that the verdict was in effect the same as a verdict of acquittal; that it might stand on the bill as it was, if the jury wished it; and an entry should be made on the record of "not guilty."

Mr. Parker, another of the jury, said that if he were to be sent back, he would find the same verdict; that they all knew that it was not in the usual form; but it was more satisfactory to the jury as they had found it; and that he would not agree to alter it.

After some further desultory remarks by several of the counsel, Mr. Hay, in answer to the observation that the only correct form was guilty or not guilty, reminded the court of the case of the King *v.* Woodfall for a libel, where the jury departed from the usual form, added other words, and found a verdict in these words, "We find the defendant guilty of publishing only." This form, though preferred by the jury, was probably disapproved of by the counsel; but it was taken by the court as they presented it; and, in the case of the King *v.* Williams, cited in Woodfall's case by the court, the jury added other words to the usual form of finding the defendant guilty; and as it did not affect the substance, it was entered up by the clerk "guilty;" and no objection was ever made.

The court then decided that the verdict should remain as found by the jury; and that an entry should be made on the record of "not guilty."

The chief justice politely thanked the jury for their patient attention during the whole course of this long trial, and then discharged them.

THE END.

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